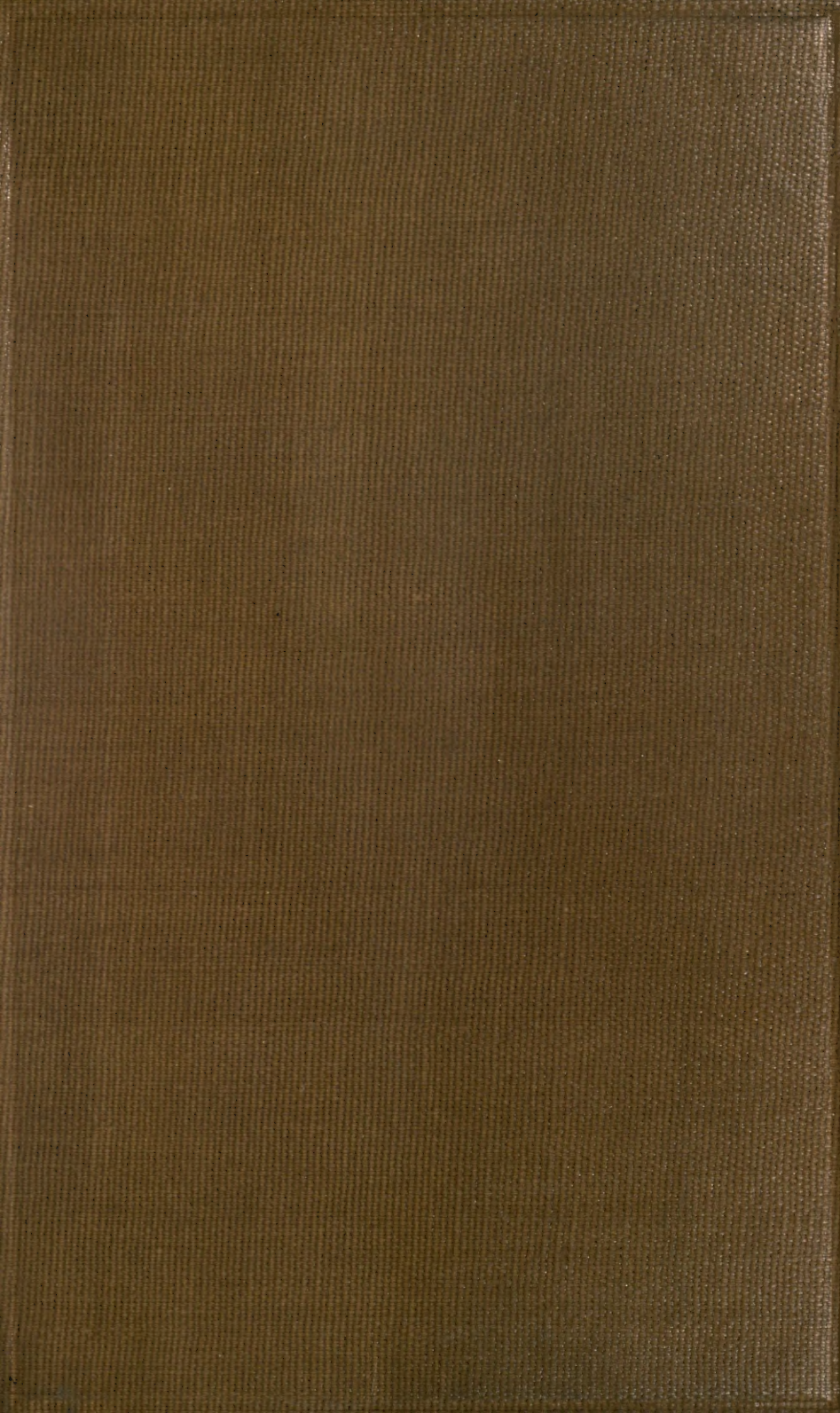






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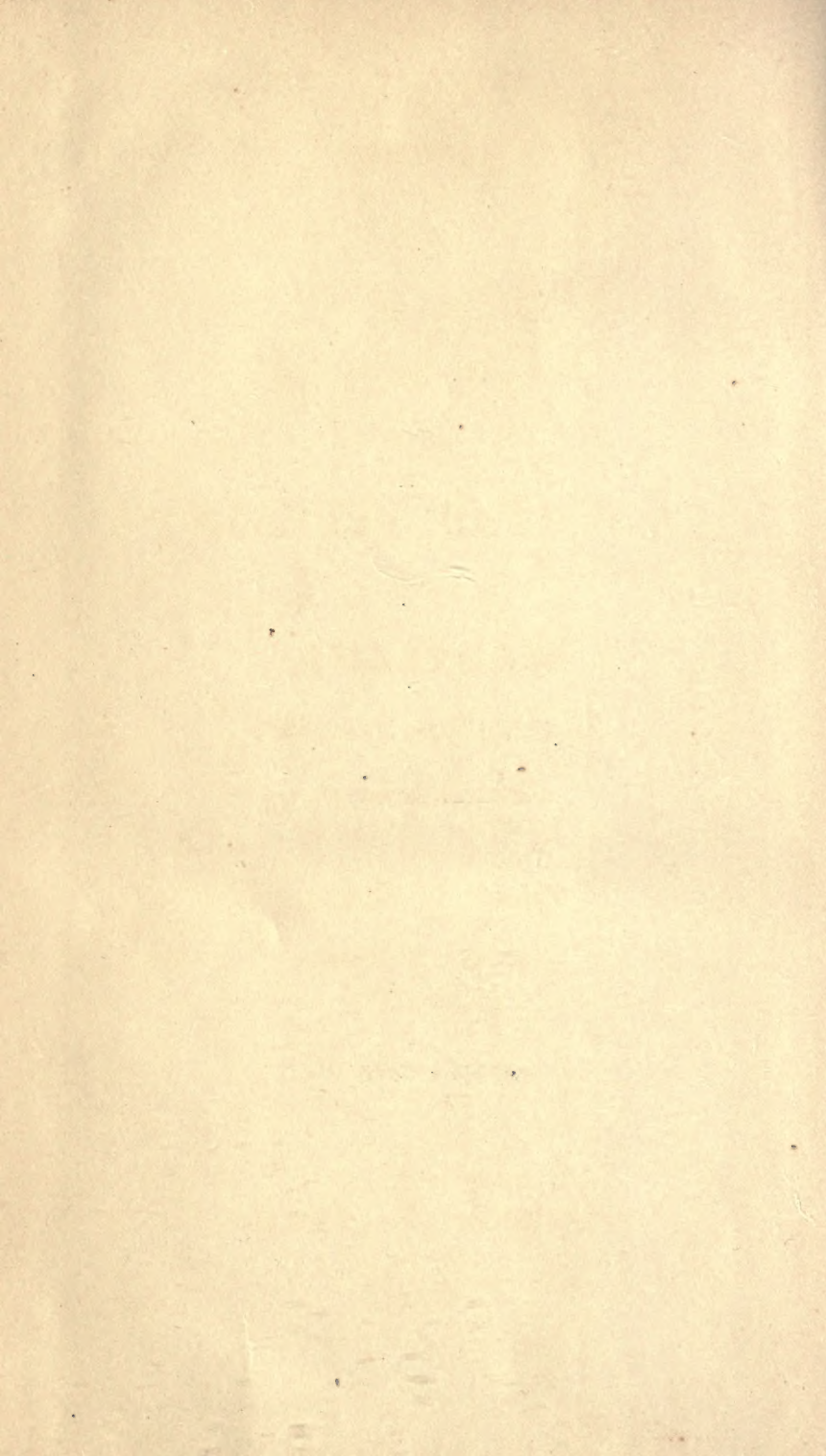
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND,
IN 1823, 1824, AND 1825.

BY THOMAS HARRIS,
Clerk of the Court of Appeals,
and
REVERDY JOHNSON,
Attorney at Law.

VOLUME VI.

For *6 copies*

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1825.

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ERRATA.

PAGE. LINE.

- 75—15 For *summoned* read *summed*.
 — 21 For *in* read *to*.
 78—26 For 1819 read 1817.
 90—29 For *plaintiff* read *defendant*.
 91—7 For *defendant* read *plaintiff*.
 97—13 For 8 read 28.
 108—30 After *render* insert *void*.
 116 In the third marginal note at the end, for *signed* read *assigned*.
 149—19 For 1810 read 1811.
 152—42 For *assign* read *assess*.
 295—32 After 1816 insert *The questions submitted to the court were whether the action was barred by act of limitations; or, whether from the facts, circumstances and exhibits, it could be supported.*
 316—2 For *return* read *retain*.
 362—7 For *Wilkins* read *Watkins*.
 399—20 For *upon* read *up on*.
 428—37 } For *rato* read *rata*.
 429—3 }
 433—38 For *have* read *here*.
 479—3 For *least* read *lest*.
 524—16 For *agreement* read *argument*.
 527 In the marginal note, for *indorser* read *indorsee*.
 533—29 For *payment* read *pay rent*.
 544—15 After *case* strike out the comma, and insert it after *stated*.
 In the *Index* tit. *Agreement* 10, line 1, for *decides* read *declares*.
 — tit. *Appeal* 5, line 5. For *effected* read *affected*.

VOL. V (omitted.)

- 213 In the third marginal note, line 9, for *not* read *only*.
 510 In the *Index*, tit. *Contract* 9, line 6, for *not* read *only*.

NAMES OF THE JUDGES

OF THE

COURT OF APPEALS, &c.

DURING THE TIME OF THESE REPORTS.

HON. JEREMIAH TOWNLEY CHASE, Chief Judge (a).

HON. JOHN BUCHANAN, Judge.

HON. RICHARD TILGHMAN EARLE, Judge.

HON. WILLIAM BOND MARTIN, Judge.

HON. WALTER DORSEY, Judge.

HON. JOHN STEPHEN, Judge.

HON. STEVENSON ARCHER, Judge (b).

HON. JOHN BUCHANAN, Chief Judge (c).

HON. THOMAS B. DORSEY, Judge (d)

COURT OF CHANCERY.

HON. WILLIAM KILTY, appointed the 25th of January 1806, succeeded on his death by

HON. JOHN JOHNSON, appointed the 15th of October 1821, succeeded on his death by

HON. THEODORICK BLAND, appointed the 16th of August 1824.

COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles and Prince George's Counties.*

HON. JOHN STEPHEN, Chief Judge.

HON. EDMUND KEY, Associate Judge.

HON. JOHN ROUSBY PLATER, do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne's and Talbot Counties.*

HON. RICHARD TILGHMAN EARLE, Chief Judge.

HON. LEMUEL PURNELL, Associate Judge.

HON. ROBERT WRIGHT, do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel and Montgomery Counties.*

HON. JEREMIAH TOWNLEY CHASE, Chief Judge.

HON. RICHARD RIDGELY, Associate Judge.

HON. CHARLES J. KILGOUR, do.

HON. THOMAS H. WILKINSON, do. (e).

HON. THOMAS B. DORSEY, Chief Judge (f).

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester Counties.*

HON. WILLIAM BOND MARTIN, Chief Judge.

HON. JAMES B. ROBINS, Associate Judge.

HON. WILLIAM WHITTINGTON, do.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington and Allegany Counties.*

HON. JOHN BUCHANAN, Chief Judge.

HON. ABRAHAM SHRIVER, Associate Judge.

HON. THOMAS BUCHANAN, do.

SIXTH JUDICIAL DISTRICT—*Baltimore and Harford Counties.*

HON. WALTER DORSEY, Chief Judge.

HON. CHARLES W. HANSON, Associate Judge.

HON. WILLIAM H. WARD, do.

HON. STEVENSON ARCHER, Chief Judge (g).

BALTIMORE CITY COURT.

HON. NICHOLAS BRICE, Chief Judge.

HON. WILLIAM M'MECHAN, Associate Judge,

HON. ALEXANDER NISBETT, do.

ATTORNEY GENERAL.

Thomas B. Dorsey, Esquire, succeeded by

Thomas Kell, Esquire, appointed the 17th of August 1824.

(a) Ch. J. Chase, owing to indisposition, was prevented from attending the court at June term 1823, and on the 15th of June 1824 he resigned.

(b) Appointed on the 8th of August 1823 to fill the vacancy occasioned by the death of Judge Dorsey.

(c) On the resignation of Ch. J. Chase, he acted as Ch. J. during the June term 1824 on the western shore, under the 6th section of the act of 1805, *ch. 65*, and on the 27th of July 1824 he was commissioned Chief Judge.

(d) Appointed on the 27th of July 1824 to fill the vacancy occasioned by the resignation of Ch. J. Chase.

(e) Appointed the 30th of March 1824 to fill the vacancy occasioned by the death of Judge Ridgely.

(f) Appointed the 27th of July 1824 in the place of Ch. J. Chase, resigned.

(g) Appointed the 8th of August 1823 in the place of Ch. J. Dorsey, deceased.

A TABLE

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

COURT OF APPEALS, JUNE TERM, 1823.

1823.

DASHIELL, *et al.* vs. THE ATTORNEY GENERAL.

JUNE.

APPEAL from a decree *pro forma* of Baltimore county court, sitting as a court of equity, on an information filed in the name of the Attorney General, at and by the relation of *The Trustees of Hillsborough School in Caroline county*, on behalf of themselves, and the poor children in Caroline county who attend the charity school of which they are trustees, against the appellants, to enforce the execution of a trust in the will of *James Corrie (a)*. The will is dated the 12th of March 1805, and the clause under which the relators claim is as follows: "All the necessary expenses attending my daughter, and the expenses of a woman to attend her until she attains the age of eighteen years, shall be paid out of the income of my estate, received by my trustees from my executors, and the residue of the income, after deducting my daughter *Mary*, and her servant's expenses, shall be appropriated, until she attains the above age of eighteen years, as follows: It shall be equally divided, one half to be applied towards feed-

Where a testator, by his will directs the trustees and guardians of his child to pay over annually a certain portion of the income of his estate to the trustees of Hillsborough school, to be by them "applied towards feeding, clothing, and educating the poor children of Caroline county, which attends the poor or charity school established at Hillsborough, in the said county" — Held, that the bequest was void for uncertainty as to the persons who were to take under it.

The poor children of a county, or congregation or school, are not susceptible of ascertainment.

The interposition of trustees does not make a bequest good, which as an immediate and direct bequest would be void for uncertainty.

(a) See the case of *Dashiell, et al. vs. The Attorney General*, ante vol. 5, 392.

The poor children of Caroline county, who attend the Hillsborough school, are not a body corporate, and cannot take in succession; and the bequest, if otherwise good, must fall as soon as the first object of the testator's beneficence ceased to attend the school.

The benefit of the undisposed subject of the trust results to the next of kin to the testator.

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ing, clothing and educating, the poor children belonging to the congregation of *Saint Peter's* Protestant Episcopal Church in the city of *Baltimore*; the other half to be applied towards feeding, clothing and educating, the poor children of *Caroline* county, in the state of *Maryland*, which attends the poor or charity school established at *Hillsborough*, in said county, the trustees of which school are to receive from my trustees the aforesaid appropriation, in payments at every six or twelve months, and appropriate the same in the manner I have now willed." This provision was to be enlarged in the event of his daughter's death, or marriage without consent of his trustees, &c. In another clause of the will he declares, "I will, that if at any future period any of my relations should require assistance to be supported, clothed and educated, that my trustees, in virtue of this will, shall give the preference to them, either in the county of *Caroline*, in the state of *Maryland*, or the city of *Baltimore*, or in any other place; they shall attend to their wants as aforesaid, in preference to all others." The testator died before the 18th of May 1805. The answers of the defendants insist that the relators are not entitled to relief, and that the devise is void in law. The decree being in favour of the relators, the defendants appealed to this court.

The cause was argued at the last June term, before BUCHANAN, EARLE, MARTIN, and STEPHEN, J.

Taney, *Winder* and *Murray*, for the appellants, contended, 1. That the will of *Corrie* contained no devise for the benefit of the relators. 2. That if the will be intended for the benefit of the relators, yet they were not capable in law to take the same. 3. That the devise was void for uncertainty, and could not be supported as a devise to a charitable use.

1. They argued that the relators were a corporate body, and the inquiry was, Were they the object of the devise? Whether a devise for the benefit of "the poor children of *Caroline* county, which attends the poor or charity school established at *Hillsborough*, the trustees of which school are to receive," &c. is a devise to the relators? Are the relators sufficiently named so as to claim the devise? A school was incorporated by the act of 1798, *ch.* 33, by the

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style of "*The Trustees of Hillsborough School in Caroline county*;" and the devise is to the poor children who attend the poor or charity school at *Hillsborough*, to be administered and appropriated by the trustees of a certain school. The trustees of *Hillsborough* school are not the trustees of a poor or charity school. The object of the testator was to benefit a charity or free school, and the claimants are not the trustees of a charity or free school. There may be a school which would answer the description used in the devise; but if there be none, then the devise would lapse. The parties claiming should bring themselves within the description of the will. The devise is claimed by a corporation, and under a will, said to refer to them in their corporate capacity. The corporate name is the essence of the corporation—it is the corporation itself. 2 *Bac. Ab. tit. Corporations*, (A) 2. (C) 4; (C 2,) 6. 2 *Blk. Com.* 474. 10 *Coke*, 125. A devise to a corporation must be made to it in its corporate name. The name may be supplied, if it is expressed by words synonymous. 2 *Bac. Ab. tit. Corporations*, (C) 5, (C 2,) 7. 11 *Coke*, 21. Here the corporation name is not so sufficiently set forth that the court can say the testator intended no other. The case of *The Chancellor, &c. of Oxford*, 10 *Coke*, 57, was sustained under the statute, 43 *Eliz. ch.* 4, for charitable uses. Some of the cases go upon the ground that an ancient corporation may acquire a name by reputation. 2 *Bac. Ab. tit. Corporation*, (C 3,) 7. And there are cases where the statute 43 *Eliz.* was necessary to cure the defect of a devise to a corporation by a wrong name. *Duke on Charitable Uses*, 379, 380, 506. So also in *The Hager's Town Turnpike Company vs. Creeger*, ante vol. 5, 122, where, in a subscription to the road, the style of the incorporation was *The President, Managers, &c.* and the form used omitted the word *President*, and this court held it was sufficient without that word. There the omission of the word *President* left enough to show and distinguish the corporation from all others; but that is not the case here. The additional acts of assembly, passed since, respecting this corporation, can have no influence on the case. 2 *Bac. Ab. tit. Corporations*, (E 1,) 10.

2. If the corporation be sufficiently described, it is not capable of taking under the devise in the will. A corporation is a creature of the charter which gives it being,

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Dashiell
vs
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and it is restricted within the bounds given to it, and has no capacities but those which the charter confers upon it. 2 *Bac. Ab. tit. Corporations*, (D) 9. (E 3,) 13. 12 *Coke*, 120. 3 *Mod.* 14. A corporation has no right to take and hold property, except in the manner pointed out in the charter. 2 *Bac. Ab. tit. Corporations*, (E 3,) 13. The charter of this corporation is limited to \$2000 yearly value, which they may take by gift, but in no other way than for the benefit of the school generally. Here the fund devised by the will is to be applied in the manner pointed out in the devise, and not to the purposes which the trustees may consider for the benefit of the school generally. It is a devise for the benefit of a *portion* of the scholars of the school—a certain description of poor children. This is not within the view of the charter, but is a devise for an object *dehors* that of the school, and is not compatible with the powers granted by the charter. *Wilmore vs. Woodroffe*, *Ambl.* 636. The trustees could not appropriate the devise in a different mode than that pointed out by the testator. We have no *cypres* doctrine here. A devise is void which gives a latitude of discretion to the trustees. *Morice vs. The Bishop of Durham*, 10 *Ves.* 541. The act of 1798, *ch.* 33, equally with the statute of *Elizabeth*, defines the object of charity. No other can be given than by that act. The trustees cannot apply it within the act of 1798, without violating the intention of the testator. The court cannot separate the devise, if part of it is within the statute. There is no rule by which it can be separated as to the portions for feeding, for clothing, and for educating. The court cannot divert the whole to the purposes of education; they cannot sever that which is intended as a unit; the whole therefore must fail. A good use is to be preferred to a superstitious use; and if the one depends upon the other, the bad use contaminates the other. *Duke* 469. 4 *Coke*, 115. *Attorney General vs. Whorwood*, 1 *Ves.* 539. *Chapman vs. Brown*, 6 *Ves.* 403. *The Attorney General vs. Davies*, 9 *Ves.* 535. These cases show, that if a void devise is connected with a good devise, both are void. The trustees cannot claim the bequest under the trust for any purposes connected with the objects defined in the charter. They are incapable of such a trust, and cannot be trustees for any purpose; if they can, then the *cestui que trust* be-

ing uncertain, as in the case of *St. Peter's church*, they must fail.

3. The objects of the trust are not so certain and definite as to admit of no doubt. Who are the poor children who attend the school? This is too vague, and gives no clue by which they can be ascertained. This question has already been argued in *Dashiell, et al. vs. The Attorney General*, (*ante*, vol. 5, 392.) A corporation cannot be executor. 1 *Blk. Com.* 504. They cannot be trustees. *The Baptist Association vs. Hart's Ex'rs.* 4 *Whcat.* 31. A use at common law is what a trust is now under the statute of uses. 1 *Coke*, 122. A corporation cannot be seized to the use of another. 2 *Bac. Ab.* tit. *Corporations*, (E) 11. *Gilb. Uses & Trusts*, 5. Bodies politic are not capable of a use or trust for the benefit of others. They cannot be seized of a trust different from what their charter embraces. If the charter gave them a right to be trustees for others, it could not be legal, because there is no mode of enforcing the trust. This is the clear doctrine of the common law. The statute of *Elizabeth* overturned the common law principle, and permitted corporations to hold in trust for charitable uses, though no such power is given by their charter. But if that statute has not been introduced here, then the principle remains as at common law. 2 *Bac. Ab.* tit. *Corporations*, 11. This devise is in perpetuity to the poor children of *Caroline county*. The fund is locked up for ever by the will of the testator, and there is no power of alienation. It is therefore inconsistent with the policy of the law. *Gilb. Uses & Trusts*, 119, 120, 168. 2 *Blk. Com.* 77, 120. A corporation cannot give perpetuity to an object not within the charter. *Christ's College, Cambridge*, 1 *Wm. Blk. Rep.* 91. The testator says that his own poor relations are to be preferred. The cases cited show who they are. The daughter of the testator will then come in if the charity is established.

Harper and *R. Johnson*, for the appellee, contended, 1. That the corporation was sufficiently designated in the will. There is nothing in the act of incorporation of 1798, *ch.* 33, to show that it is not a charity school. The preamble of the act states that it is to endow a school; and as there was no other school then established at *Hillsborough*, or in *Caroline county*, the testator evidently meant the trustees

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of this school. It is not necessary to describe precisely the corporate name either in a deed or a will—many omission of words may be supplied by averments. The bill in this case states the school to be a charity school, and that it was the one alluded to by the testator. This is not denied in the answers; and the accounts exhibited by the executors under the will, show that money was paid by them to the trustees of this school. There is no doubt then of the identification; and the trustees say, that poor children do attend that school as a charity school. The school was endowed by private donations, showing it was intended for charitable purposes. The acts of 1806, *ch.* 25, s. 3, 1807, *ch.* 32, and 1810, *ch.* 109, evince at least a legislative construction that it was a charity school. The decision in *The Hager's Town Turnpike Road Company vs. Creager*, went upon the ground of there being no other company of a similar name. Here there was no other school which could possibly answer the description. The court can judicially notice that there was no other incorporated school at *Hillsborough*, or in *Caroline* county, as was done in 11 *Coke*, 21, that there was but one Bishop of *Norwich*.

2. The trustees are capable of taking under the devise for the purpose contemplated. One of the incidents of a corporation is to take and hold property; and the power of perpetual succession, &c. 1 *Blk. Com.* 502. Supposing it a charity school, the poor children must be fed and clothed, as well as educated; and this comes within the terms of the powers of the trustees under the charter. These are the very children to whom the testator's bounty is to be applied. The charter gives the trustees unlimited control over the funds, to be appropriated by them at their discretion. There is nothing in the language of the bequest which is inconsistent with the charter. The trustees have authority to educate the poor children. Can it be said that, because directions to feed accompany the direction to educate, that the last direction is void? If the poor children could not be educated unless they were fed and clothed, then they must be fed and clothed; and if they could, then why not appropriate the whole fund in educating them? If these views are correct, it is wholly unnecessary to answer any of the other objections which have been urged. The bequest is certain in saying the poor

children attending the school. It means those whom the trustees permitted to go to school, without paying for their education; and is similar to the case in *Duke*, 361. The doctrine of perpetuity is not applicable to a corporation. This is a devise to a corporation for the benefit of a certain description of poor children; and is a devise in trust. 2 *Buc. Ab. tit. Corporations*, 6.

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Curia ad. vult.

At this term, the opinion of the court was delivered by EARLE, J. After much reflection on this case, we think it not essentially different from the case of *George Dashiell and others, against the Attorney General, at the relation of the Vestry of St. Peter's Church in the city of Baltimore, and others*, adjudicated in this court at the last June term(a), and that it must be decided on the same principles.

The testator, by his will, directs the trustees and guardians of his child, to pay over annually a certain portion of the income of his estate to the trustees of *Hillsborough* school, to be by them applied towards feeding, clothing and educating, the poor children of *Caroline* county, in the state of *Maryland*, which attends the poor or charity school established at *Hillsborough*, in the said county.

The poor children of *Caroline* county, in the state of *Maryland*, which attends the poor or charity school established at *Hillsborough* in the said county, are the objects of this bequest, and if it had been immediately to them, the question might be made, to whom should the executor of the deceased have paid it, or by whom would the suit be brought either at law or in equity, if he refused to pay it? With the best intentions to fulfil the wishes of the testator, it would be difficult, in such a case, for an executor to perform his duty, and at last he would certainly find it a trust not capable of execution. His dispositions to do right might take him to the *Hillsborough* school, to make his payments, but when there, he would be at a loss to determine who were the poor children of *Caroline* county attending that school. The poor children of a county or congregation, or a school, are not susceptible of ascertainment; and when such terms are used in wills as a *designatio personarum*, they have always been determined in-

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sufficient, and the devise or bequest, intended to be created by them, to be void for uncertainty. *Powell on Devises*, 419. The difficulty in the case supposed, would yet be greater, if an attempt was made to enforce the bequest against the executor, either in a court of law or in a court of equity. What children of *Caroline* county, attending the *Hillsborough* school, could assume to themselves the title of "the poor children which attend that school;" and if assumed by any individuals, by what conceivable standard of proof could they establish their right to the designation?

In the case before us, the bequest is, to the poor children of *Caroline* county which attend the poor or charity school established at *Hillsborough* in that county, as *cestui que trusts*; and a question further arises, whether the interposition of trustees makes the bequest good, which as an immediate and direct bequest, would be void for uncertainty? This question, it seems to us, may be answered, by suggesting the same insurmountable obstacles to the executing and enforcing the trust, as exist where the bequest is immediate to persons doubtful and uncertain. The terms used by the testator are too indefinite to point out to the trustees the objects of his bounty, or to designate the persons who are to enforce the trust; and if the trust in such a case would not result for the use of others, it is manifest the trust fund would of necessity become the property of the trustees. The fund established by the testator is a perpetual fund, intended by him to supply an income, not only to the poor children of *Caroline* county who, at the time of his death, attended *Hillsborough* school, but for the benefit of the poor children of *Caroline* county, who should in succession attend that school, and this forms another unanswerable objection to the testamentary disposition we are considering. The poor children of *Caroline* county which attend the *Hillsborough* school, are not a body corporate, and cannot take in succession, and the bequest, if otherwise good, must fall, as soon as the first objects of the testator's beneficence ceased to attend the school.

It is needless to pursue this subject further, or to examine points which were discussed on the argument as peculiar to this case. Our decision must be governed by the adjudication already mentioned, and to it we refer for the

principles on which we reverse the judgment below, and are of opinion that the benefit of the undisposed subject of the trust results to the next of kin to the testator.

DECREE REVERSED.

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ERROR to *Frederick* county court to remove a judgment in a criminal prosecution against the plaintiff in error for giving a pass to a slave.

In a criminal prosecution against a person for giving a pass to a slave contrary to the act of 1796, *ch. 67, s. 19*, the loss of service by the master must be averred in the indictment.

The cause was argued before EARLE, MARTIN and STEPHEN, J.

The giving a pass to a slave is prohibited by the act of assembly as one of the means only by which the offence of depriving the master of the service of the slave was to be consummated.

Taney, for the plaintiff in error, contended, that the charge in the indictment was not an offence indictable under the act of 1796, *ch. 67, s. 19*. He referred to 3 *Bac. Ab. tit. Indictment*, (H 3,) 570. *The King vs. M. Gregor*, 3 *Bos. & Pull.* 106.

T. B. Dorsey, (Attorney-General,) for the state, also referred to the act of 1796, *ch. 67, s. 19*. 3 *Bac. Ab. tit. Indictment*, (H 2,) 569. The acts of 1715, *ch. 44*, and 1801, *ch. 74, s. 1*. 1 *Chitty's C. L.* 233.

The opinion of the court was delivered by

STEPHEN, J. The question in this case arises upon the true construction of an act of assembly passed in the year 1796, *ch. 67, s. 19*. The act provides, "that any person or persons who shall hereafter be convicted of giving a pass to any slave or person held to service, or shall be found to assist by advice, donation or loan, or otherwise, the transporting of any slave, or any person held to service, from this state, or by any other unlawful means depriving a master or owner of the service of his slave, or person held to service, for every such offence the party aggrieved shall recover damages in an action on the case against such offender or offenders, and the offender is also liable to be indicted, and on conviction to be fined a sum not exceeding two hundred dollars." The indictment in this case charges nothing more than that the party prosecuted gave a pass to a slave, the property of a certain *John Withers*, contrary to the act of assembly in such case made and provided, without averring any loss of service by the master or owner. The question

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is, whether such an indictment is sufficient, in point of law, as having charged all the essential ingredients necessary to constitute an offence according to the true construction of the 19th section of the above mentioned act of assembly?

It was strongly contended by the counsel for the plaintiff in error, that according to the true construction of the act of assembly, it was not intended by the legislature, that the giving of a pass alone, to a slave, should be punished in the manner therein prescribed, and that it was only prohibited as one of the means by which the offence of depriving the master of the service of the slave was to be consummated. This, it seems to the court, is a fair construction of the law, and that the party could not properly be said to be aggrieved; so as to entitle him to his civil suit for the recovery of damages, without actual loss of service; and upon referring to the law, it will be found that the criminal process can only be resorted to upon the same grounds or circumstances which would authorise a civil action. The court are therefore of opinion, that the offence contemplated by the law, is not charged in the indictment, and that the judgment of the court below must be reversed.

JUDGMENT REVERSED.

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CROMWELL, *et al.* vs. OWINGS.

An award by arbitrators cannot be impeached for erroneous judgment upon facts.

Exceptions to an award cannot be founded upon any thing *dehors* but must always be confined to matter appearing upon the face of it, compared with the proceedings in the cause, and are never heard upon affidavits.

To set aside an award for any matter *dehors* as corruption or misbehaviour on the part of the arbitrators, or other

charges to be sustained by evidence, it can only be done on motion supported by affidavits.

If an award be both of matter that is submitted, and of that which is not within the submission, it may be good as to all that is within the submission, and void as to the residue.

All persons are to be made parties, who are either legally or beneficially interested in the subject matter and result of the suit.

Where under certain circumstances it was not necessary to make one of the legatees a party in a suit by the other.

If a defendant in chancery agrees that a bill should be filed against him by certain complainants, he will not be allowed afterwards to object for the want of other parties.

APPEAL from a decree of the Court of Chancery dismissing the bill of the complainants, (now appellants.)

The cause, which is sufficiently stated in the opinion delivered by this court, was argued before BUCHANAN, EARLE, MARTIN, DORSEY, and STEPHEN, J.

Taney and *Winder*, for the appellants, stated that the bill was filed by consent on the 22d of January 1819, by certain of the devisees of *Samuel Owings*, deceased, against the defendant, another devisee, and executor of the deceased, with a view of referring the subject matter in dispute to arbitrators, as appears by an agreement for that

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purpose executed by the parties on the 22d of June 1818. The cause was accordingly referred to arbitrators, who made an award. To this award certain objections were made, some of which were sustained by the chancellor. It was also objected that *Beale Owings*, one of the residuary legatees, had not been made a party; and the chancellor dismissed the bill. They contended, 1. That the objections to the award were unfounded; and 2. That the bill, answer and agreements, were a waiver of the objection to make *B. Owings* a party, even if it were originally necessary to have made him a party, and constitute a specific contract between the complainants and the defendant, which a court of chancery would carry into effect. On the first point they referred to *Morgan vs. Mather*, 2 Ves. jr. 22. *Dick vs. Milligan*, *Ibid* 24, 28. 1 Bac. Ab. tit. *Arbitration & Award*, (F) 228, (G) 231, (note,) (J) 238. On the second point they referred to *Cooper's Plead.* 34.

Heath and *R. Johnson*, for the appellee, on the first point relied upon *Goldsmith vs. Tilly*, 1 Harr. & Johns. 362, and the act of October 1778, ch. 21, s. 8; and on the second point they relied upon *Cockburn vs. Thompson*, 16 Ves. 326. *Chancey vs. May*, *Pre. in Chan.* 592. 2 Madd. Chan. 145. *Baldwin vs. Harpur*, *Ambl.* 375. *Hannan vs. Stevens*, 1 Vernon, 110. *Kirk vs. Clarke*, *Pre. in Chan.* 275. 1 Harr. Chan. Pr. 81. *Sherrit vs. Birch*, 3 Bro. Ch. Ca. 229. *Parsons vs. Neville*, *Ibid* 365. *Capron vs. Van Noorden*, 2 Cranch, 126; and *Coale et al. vs. Stewardson*, in this court in 1811.

The opinion of the court was delivered by

BUCHANAN, J. *Samuel Owings* by his will, dated the 7th of May 1803, among other things, devised certain lands to *William Owings*, his executor, to sell, and the proceeds to be distributed among eight of his children named in the will, of whom *Beale Owings* was one. The testator also bequeathed the proceeds of certain personal property to be distributed in like manner. One of the eight legatees is since dead, having issue two children.

The bill is by six of the legatees named in the will, and the two children and representatives of the deceased legatee, calling on the executor and trustee to account and pay to them their respective proportions; and *Beale Owings*, the other legatee named, is not made a party to the

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proceedings either as complainant or defendant. The chancellor, by agreement in writing of the respective solicitors, passed an order referring the matters in controversy between the parties to referees named in the agreement, who returned an award ascertaining the sum due to each of the complainants, and directing the same to be paid to them respectively by the defendant, and also directing the defendant, by a good and sufficient conveyance, to transfer certain lands, bonds, &c. to a trustee to be appointed by the chancellor. Objections were filed by the defendant to a decree being passed on the award, founded on objections raised to the award itself, and also on the circumstance that *Beale Owings* was not made a party to the proceedings; whereupon the chancellor passed an order, in which he expressed the opinion, that *Beale Owings* ought to have been made a party to the proceedings; that the arbitrators had exceeded their powers in awarding a change of trustees; and that *Peter Hoffman* had exercised an improper influence over the arbitrators—and afterwards dismissed the bill for want of proper parties. First, then, as to the award:—It is clear that an award upon a reference to arbitrators, cannot be impeached for erroneous judgment upon facts; but the arbitrators, being judges chosen by the parties themselves, their decision on matters of fact cannot be reviewed, but is final and conclusive, where there is no imputation on their conduct. *Morgan vs. Mather*, and *Dick vs. Milligan*, 2 Vesey, Junr. 14, 24. The subject of the award in this case, being matters of account, they were facts, on which it was the province of the arbitrators to decide, and their judgment cannot be inquired into, but the parties are concluded and bound by it, unless a foundation is laid for setting aside their award, by an imputation on the conduct of the arbitrators. And no such foundation is laid, the objections to the award being all confined to the decision of the arbitrators on questions of fact, except so far, as in the opinion of the chancellor, there is a colourable charge of improper influence practised by *Peter Hoffman* upon the arbitrators, and except also the objection to so much of the award as is alleged to be without the submission. Exceptions to an award cannot be founded upon any thing *dehors*, but must always be confined to matter appearing upon the face of it, compared with the proceedings in the cause, and are never heard

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upon affidavits. But if it is proposed to set aside an award for any matter *dehors*, as corruption or misbehaviour on the part of the arbitrators, or other charges to be sustained by evidence, it can only be done on *motion* supported by affidavits. *Dick and Milligan. 2 Vesey Jr. 24*

With respect therefore to the supposed influence exercised by *Peter Hoffman* over the arbitrators, being altogether *dehors* the award, it cannot be received or acted upon to the prejudice of the award, in the form of exception, but ought to have been proceeded on by way of motion to set aside the award. But if it could be taken advantage of by way of exception, or if in the place of an exception to the award, it had been made the foundation of a motion to set it aside, and could now be so considered, there is nothing whatsoever in the record to sustain it. The letter of the 15th of October 1819, from the arbitrators to the defendant, on which the opinion of the chancellor was founded, and which is now relied upon to show the undue influence of *Peter Hoffman* over the arbitrators, does not seem to this court to furnish the slightest ground for such an imputation. The sole office of that letter was to inform the defendant that the account he had exhibited to them, had been submitted to *Peter Hoffman*, acting in behalf of the complainants, and that he had insisted on proof being made of all the charges it contained—with a request, that he would furnish such proof, and also let them know whether he had any further account to produce. If the arbitrators had acted on that account, without requiring proof of the charges it contained, or letting the complainants, or their agent, know that such a paper had been exhibited, there would perhaps have been cause for complaint on the other side—or, if they had rejected the account, without affording the defendant an opportunity of proving it, or had refused to receive evidence in support of it, then indeed a charge of misconduct on the part of the arbitrators would have had some ground to stand upon; but it is difficult to perceive how any imputation on the conduct of the arbitrators can arise from that letter. The other objection, *that a part of the award is not within the submission*, being to what arises on the face of the award, it comes properly in the form of an exception; and it is very clear, that so much of the award, as respects the removal of the defendant as trustee, and the appointment

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of another trustee by the chancellor in his place, is without the submission, and void. But it is well settled, that if an award be both of matter that is submitted, and of that which is not within the submission, it may be good as to all that is within the submission, and void as to the residue. 1 *Bac. Ab. tit. Arbitrament and Award*, and the authorities there referred to. Therefore, though a part of this award is of that which is not submitted, and consequently void, yet being entirely distinct matter, it does not vitiate or affect so much of the award as is within the submission, but as to that the award is good, being of what does not depend upon the matter awarded, without the terms of the submission. As to the objection, that *Beale Owings* ought to have been made a party, the ground on which the bill was dismissed by the chancellor, it is a general rule, that all persons should be made parties who are either legally or beneficially interested in the subject matter and result of the suit; and admitting, that in a different state of things it would have been proper and necessary to have made him a party, being a legatee named in the will of *Samuel Owings*; yet under the circumstances of this case, that necessity does not exist. Before the institution of this suit, *Beale Owings* had himself filed a separate bill in chancery against the defendant *William Owings*; and on the 22d of January 1819, this bill was filed on the same day the answer was put in, and received by agreement without oath; on the same day also, the parties, complainants and defendant, filed a written agreement, signed by their respective solicitors, to refer the matters in controversy between them to *David Williamson*, *David Winchester* and *Henry Brice*, in pursuance of a request on the part of the defendant contained in a paper filed in the cause, dated the 22d June 1818, and signed by him and *Peter Hoffman*, one of the complainants, in which also the answer before put in by him to the bill of *Beale Owings*, is directed by the defendant, *William Owings*, to be copied and filed in this suit, then about to be brought, the object of which is stated to be an amicable adjustment of the estate of his father; and on the next day, the 23d of January 1819, the chancellor passed the order, referring the matters in dispute to the persons before named and agreed upon. Thus it is manifest, that this was originally an amicable proceeding, and that it was perfectly understood and agreed upon, before the bill was filed, that *Beale*

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Owings should not be made a party, but that the defendant, and these complainants alone, would proceed to a settlement of their affairs, leaving him to pursue his own course. How else can the agreement of the 22d of June 1818 be understood? The suit had not then been brought, but is there treated of as an amicable bill about to be filed; with authority given by *William Owings* to a solicitor to appear to it for him; and his instructions that a copy should be taken and filed of the answer he had made to the bill of *Beale Owings*, show that that case was then present to their minds, and that the bill about to be filed, was mutually agreed upon, for the purpose of adjusting the separate claims of these complainants by arbitration, under the sanction of the court of chancery. It was in conformity to; and in furtherance of these views of the respective parties, that the bill and answer, and the agreement by their solicitors to refer the suit, were filed on the same day, without process to bring in the defendant, or requiring the answer to be on oath; and the deed from *William Owings* of the 30th of March 1819 to *Thomas Moale*, *Peter Hoffman* and *George Winchester*, soon after the bringing of this suit, to secure the payment of the supposed amount of the respective claims of these very complainants, furnishes additional evidence of the understanding of the parties before and at the time the bill was filed. Surely, without calling in aid a court of justice, the defendant and these complainants, or either of them, might have submitted the matter in dispute between them to arbitration, and the award, when made, would have been binding and conclusive upon them; and if so, there is nothing to prevent their resorting, by consent, to a court of chancery, to effect that, under the sanction of a rule of court, which might have been done by submission out of court without suit; and it does not lie in the mouth of the defendant to object, that *Beale Owings* ought to have been made a party, after putting the complainants to the trouble and expence of a suit in chancery, on the faith of his agreement. But the order of reference being made with the assent of his solicitor, at his express request, the award, so far as it is within the submission, is obligatory upon him; and *Beale Owings*, not being a party to the submission, and altogether unaffected by it, there would have been no propriety in making him a party to the suit afterwards, for the purpose of a decree upon

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the award, in which he was in no way concerned, any more than it would be necessary to unite him in a bill to enforce the execution of an award made on a submission by *William Owings* and these complainants, to which he was not a party, or in a bill in chancery to foreclose a mortgage given by *William Owings* to these complainants, or any of them; to secure the payment of their respective claims; in neither of which cases can it be pretended, that *Beale Owings* would be a necessary party. The agreement by *William Owings*, that a bill should be filed by these complainants alone, was a contract by which he was bound and estopped to object, in violation of his agreement, to a decree upon the award, on the ground that *Beale Owings* was not a party to the suit. We therefore think, that the chancellor erred in dismissing the bill for that reason.

DECREE REVERSED, &c.

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HAMILTON vs. CRAGG.

R T, by her will, bequeathed to S T five negroes by name, during her natural life, them and their increase, and that after the death of S T, the above named negroes be free—*Held*, that the words “the above named negroes,” were intended to be used as words of description, and apply to all who were the subject of the bequest the issue as well as their mothers.

An infant slave, “unable to gain a sufficient maintenance and livelihood,” cannot be manumitted under the act of 1796, ch 67.

APPEAL from a judgment rendered in *Prince-George's* county court, for the petitioner in that court, (the appellee,) on his petition for freedom. The facts are sufficiently stated in the opinion given by this court.

The cause was argued before BUCHANAN, EARLE, MARTIN, DORSEY, and STEPHEN, J.

Magruder, for the appellant, referred to the act of 1809, ch. 171. *Somerville vs. Johnson*, 1 *Harr. & M^cHen.* 352. *Standiford vs. Amos*, 1 *Harr. & Johns.* 526; and the act of 1796, ch. 67, s. 13.

R. Johnson and *J. Forrest*, for the appellee, also referred to the act of 1809, ch. 171.

The opinion of the court was delivered by

BUCHANAN, J. *Rachel Turner* made her will on the 22d of February in the year 1801, in which there is this bequest: “Item. I give and bequeath unto my loving sister *Sarah Turner*, five negroes, by name, *Frank*, *Joe*, *Zille*, *Mill* and *Lin*, to possess and enjoy during her natural life, them and their increase, and my will is, that after my said sister's death, the above named negroes be free.” *Rachel Turner* died soon after the execution of her will, which

was admitted to probat on the 5th of April 1808. *Sarah Turner*, the legatee, died in the year 1807, having previously, on the 24th of May 1804, executed her will, which was admitted to probat on the 4th February 1808, and in which, after a small bequest to *Elizabeth Beck*, she bequeathed "all her property" to *Andrew Hamilton*, the appellant, who under that will claims title to *James Cragg*, the petitioner. It is admitted that *James Cragg* is the son of *Mill*, one of the negro women bequeathed by *Rachel Turner* to *Sarah Turner*, and that he was born in the year 1805 or 1806, after the death of *Rachel Turner*, and in the life-time of *Sarah Turner*; and we are called upon to determine whether, under the will of *Rachel Turner*, he is entitled to his freedom?

The first question submitted, arises on the words of the latter part of the bequest to *Sarah Turner*, "my will is, that after my said sister's death the above named negroes be free." If the words "the above named negroes" were used in reference to those only who were before called and described by name, the petitioner, (*James Cragg*,) not being named nor *in esse*, could derive no title to his freedom by force of the terms used, but followed the condition of his mother at the time of his birth, who, though to become free, on the death of *Sarah Turner*, the legatee, was, during her life-time, not in the capacity of a servant, but in the state and condition of a slave; she had no civil rights, and could have pursued no legal remedy against her mistress on any account; she could have made no will, and was incapable of taking either by purchase or descent; the product of her labour belonged to her mistress; she could neither plead nor be impleaded, and was subject to all the disabilities and incapacities incident to a state of slavery; she was a mere chattel, the property of her mistress, who could have sold or transferred her at pleasure. Her becoming free, depended on the contingency of her surviving *Sarah Turner*, and if she had died before *Sarah Turner*, she would have died a slave, and could have had no heirs, and no civil right could have been claimed under her, founded on the relation of blood—when in that state of slavery, the petitioner was born, and though, on the death of *Sarah Turner*, in 1807, his mother became free, yet she may be said then first to have been "born into civil life," and her new born capacities, incident to her new state of

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being, could not have a retrospect to the time of his birth; to the effect of giving him civil rights with which he was not born; but he became the slave of *Sarah Turner*, under the authority of the cases of *Scott vs. Dobson*, and *Somerville vs. Johnson*, 1 Harr. & M-Hen. 160 and 352, and *Standiford vs. Amos*, 1 Harr. & Johns. 526; by which it is settled, that where a negro woman, bequeathed to one for the life of the legatee, has issue during his life, and after the death of the testator, such issue shall belong to the legatee, on the ground, that the issue is to be considered not as an accessory but as a part of the use, and to go to the person to whom the use is limited. But the will of *Rachel Turner* is not to be so construed. There is no limitation over of the issue of the women bequeathed to *Sarah Turner*, to whom the testatrix meant to give freedom after the death of the legatee, as well as to their mothers; and the words "the above named negroes," were intended to be used as words of description, not to be restricted to those who were before mentioned by name, but must be understood as applying to all who were the subject of the bequest, the issue as well as their mothers. They were all placed in the same state and condition during the life of *Sarah Turner*, and no difference in their conditions, after her death, was intended, but all were equally the objects of the benevolence of the testatrix; and the issue, as well as their mothers, were entitled to their freedom on the death of *Sarah Turner*, the legatee for life, if they were in a predicament to receive it. But by the 13th sec. of the act of 1796, ch. 67, it is enacted, "that all persons capable in law to make a valid will and testament, may grant freedom to, and effect the manumission of any slave or slaves belonging to such person or persons, by his, her or their last will and testament; and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other period as may be limited in such last will and testament; provided always, that no manumission hereafter to be made by last will and testament, shall be effectual to give freedom to any slave or slaves, if the same shall be to the prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood at the time the freedom given shall commence." The petitioner, *James Cragg*, was born in the

year 1805 or 1806, and *Sarah Turner*, the legatee for life, died in the year 1807, so that he could not have been more than two years old at the time of her death, and consequently was not, in the language of the law, able to work and gain a sufficient maintenance and livelihood at the time that the freedom intended to be given was to commence; therefore, though he was within one of the provisions of the act, that is, under the age of forty-five years, yet not having the other requisite, "the ability to work and gain a sufficient maintenance and livelihood," the next question is, was he in a predicament to receive his freedom, or to take any benefit under the will? The policy and object of the law is to prevent those, who by reason of their tender years, or of decrepitude, old age, or fixed and permanent disease, are unable to maintain themselves, from being cast by emancipation, as a burden upon the community, or thrown into a state of suffering and of want. The law makes no distinction in favour of infants, and did not intend to rest upon the ties or obligation of natural affection, nor on the ability of mothers to protect and support their issue; they might themselves be slaves, or dead, or might die before the period appointed for the freedom to commence, leaving their issue too young to take care of themselves; or if free and living, they might want both the inclination and ability to support and maintain them. But it looks, in relation to all, to the age and personal ability to work and maintain themselves, of the individuals intended to be set free, and to no adventitious circumstances. On that principle, the case of *Negro Anna*, against *Woodburn Adm'r. of Burroughs*, a petition for freedom, was decided by this court at June 1817. There, *Leonard Burroughs* by his will, bequeathed her freedom to his negro woman *Anna*, the petitioner, who was above the age of forty-five at the time of the testator's death; and, besides other property, he bequeathed to her also her son as a labourer. It was urged in support of her claim to freedom, that although she was above the age of forty-five years, yet the property bequeathed to her by the testator was sufficient for her maintenance, and therefore that the spirit and the policy of the law were gratified. But it was determined that she acquired no right to freedom under her master's will, on the ground, that by the act of assembly, from which alone the power to manumit slaves by last

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will and testament is derived, no slave could be set free who was not both under the age of forty-five years, and able to *work* and *gain* a sufficient maintenance and livelihood at the time that the freedom was intended to commence; and the circumstance that property was bequeathed to her, adequate, as was alleged, to her support, was not deemed sufficient to give effect to the manumission, contrary to the plain and unequivocal expressions of the act. In this case the petitioner was indeed under the age of forty five years, but being unable to work and maintain himself at the time of *Sarah Turner's* death, the event on which he was to become free, we are constrained to say that the will was ineffectual to confer upon him his freedom, and that the judgment must be reversed.

JUDGMENT REVERSED(a).

(a) We subjoin the following case of *NEGRO JACK vs. HOPEWELL*, in the general court at *May term* 1781, on an appeal from *Saint Mary's* county court, as applicable to the preceding case.

The appellant preferred his petition to the county court, claiming his freedom under the will of *William Cole*, dated the 7th of February, 1732, wherein, amongst others, is this bequest: "I give and bequeath unto my dear beloved wife, *Elizabeth Cole*, all my negroes, viz. *Sam*, *Moll*, *Tom*, *Sarah*, *Job*, and their increase, during her *natural life*; and also my moveable estate for ever; and after her decease, I leave all my *above negroes* free and for themselves; and also my lands, after her death, I leave to be equally divided amongst them." It was admitted, that negroes *Nan* and *Frank* or *Frances*, two petitioners for freedom in another case, were the children of negro *Moll*, named in said will and bequest, and that they were born in the life-time of *Elizabeth Cole*, the devisee in said will, and after the death of the testator, and that *Elizabeth* survived the testator; and that negro *Jack*, the petitioner in this case, was the descendant of said negro *Nan* or *Frank*, and had been held in slavery from the time of his birth. The defendant in the county court, (the present appellee,) produced to the court a transcript of an instrument of writing, taken from the records of *Saint Mary's* county, executed by the said *William Cole* on the 2d of November, 1732; whereby, for great love and affection which he bore to his wife *Elizabeth*, he gave to his said wife the following negroes, viz. *Sam*, *Moll*, *Tom* and *Sarah*, and all other his goods and chattels he had, might or ought to have; to have to the said *Elizabeth*, her heirs and assigns for ever, and had and did deliver the negro woman, named *Moll*, in the name of the whole. This instrument of writing appeared to have been executed, and the said negro delivered in pursuance of it, in the presence of two witnesses. It was recorded on the 16th of November, 1732. The county court gave judgment against the petitioner, who prosecuted this appeal.

J T Chase, for the appellant, contended, that all the descendants of the negroes, mentioned in *William Cole's* will, became entitled to their freedom on *Mrs. Cole's* death. This was obviously the testator's intention, for in every part of the will he places the issue on precisely the same footing with those who are expressly named, respecting whose right to be free no question had been or could be raised. To show how intimately and indissolu-

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APPEAL from the Court of Chancery. The case is accurately stated by the appellant's counsel in his argument, made at this term before BUCHANAN, EARLE, MARTIN, and DORSEY, J.

Magruder, for the appellant. The facts in this case are, that *John Westeney*, on the 29th August 1786, executed a will, in which he directed all his estate, real or personal, to be sold by his executors, and after paying his debts and funeral charges, that there should be remitted to Messrs. *Eliza and Mary Steries, & Co. of Edinburgh, £260 st'g.* After some trifling legacies, the remaining part of the pro-

bly they are connected, it is only necessary to read the bequest. The testator gives negro "*Sam, Moll, &c. and their increase*, to his wife during her natural life, and after their decease, leaves all his above negroes free and for themselves." Now this language is equally applicable to the increase, as to those who are specified. It is impossible to refer any part of it to one, without also referring it to the other. The counsel for the appellee may contend, that it was not intended to manumit the increase, because, by the bequest, the only persons whom the testator wished to be free, were such as could take the land devised in the latter clause of the will, and that the increase, not being *in esse* at the time of making the will, were incapable of taking under that devise. This, however, is not a correct doctrine; for it is well established, that either real or personal property may be left to persons not *in esse*, and who, when born, may receive the benefit of it as fully as if they had been in existence at the death of the devisor. In support of this position, he referred to 2 *Vern.* 705. 1 *Eq. Ca. Ab.* 203. 2 *Eq. Ca. Ab.* 290, pl. 2. *Vin. Ab. tit. Devise*, 86, pl. 6. Since the testator has expressly said that the increase shall be free, all those doubts, which might otherwise have arisen, are removed, for it will hardly be contended that the increase could not be disposed of because they were *in esse* when the testator died. Lest, however, such an opinion should be advanced, he said he would show to the court, from the highest authority, that it was erroneous; he accordingly cited the following passage from *Swinburne*, 186: "not only that thing may be devised which is truly extant, or hath an apparent being at the making the will, or at the death of the testator, but that thing also which is not in *rerum natura* while the testator liveth, as the corn which shall be sown or grow in such a soil after his death, or the *Lambs which shall come of his flock of Sheep next year.*" Nor (he said,) does any doubt exist respecting the power which every man possesses to give by will a life estate in a personal chattel, with a remainder over. He referred to 2 *Eq. Ca. Ab.* 319. 2 *Freem.* 206. *Co. in Ch.* 280. 1 *P. Wms.* 534, 535. He also cited *P. Wms.* 340, 342. 1 *Atk.* 410, 412, 435. *Pr. in Chan.* 470.

T. Stone, for the appellee.

THE GENERAL COURT reversed the judgment of the County Court. The appellee appealed to the Court of Appeals, and, at May Term, 1784, the judgment of reversal was affirmed in the Court of Appeals.

A decree in equity for the sale of lands to pay debts or legacies, or for the purpose of distributing the proceeds among those entitled, is a proceeding *in rem*. The chancellor has the power of enforcing such a decree, by ordering the possession to be delivered to the purchaser under the decree, in certain cases.

The exercise of this power, in relation to all such persons as were parties to the proceedings, and whose rights have been determined by the decree, is essential to the full administration of justice. Persons who come into the possession of the land *pendente lite*, claiming title to it under the parties to the bill, or some of them, stand in the same predicament with those whom they represent in point of interest.

But where a person is in possession at the time the bill was filed, claiming adversely, and was not a party to the decree, his interest cannot be affected by it; and from such a possession he cannot be removed until his title is adjudged to be defective in the regular and established course of judicial proceedings, and not in a summary manner by way of motion.

How far a third person, who comes into the possession during the pendency of the suit in equity, claiming adversely to the litigating parties, can, after a decree & sale, be removed in a summary way at the instance of the purchaser? *Quere*

Whether the will in this case was ro-

voked by a subsequent marriage and the birth of a child? *Quere*

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ceeds of his estate he gave to his beloved friend, and *intended wife*, *Mary Steries*, to be remitted and paid to her as soon as possible and convenient after his death. The testator went to *Edinburgh*, married *Miss Steries*, by whom he had issue, and lived some years. The will was not admitted to probat till the year 1808. In 1813 letters of administration *de bonis non*, on the estate of the testator, were granted to *Thomas Sellman*, who, as *am'r. d. b. n.* petitioned the chancellor to appoint a trustee to sell the real estate of the deceased, and the chancellor passed a decree to that effect at February term 1817. In August 1817, the trustee reported, that under the said decree he had sold the property; and that *Joseph Morton*, the appellee, became the purchaser. This sale was ratified on the 14th of Nov. 1817. The appellee filed a petition, stating that *Tongue*, the appellant, without any right or legal authority, had taken and held possession of the land sold to him, alleging the same to be subject to escheat for want of the heirs of *Westeneys*. The petitioner prayed the chancellor to grant him an *injunction* to put him in possession against *Tongue*, who appeared and put in an answer. A commission issued, and testimony was taken. The chancellor ordered an injunction to be issued, as prayed.

On these facts, the counsel contended, that the decree was erroneous—1. Because the marriage and birth of a child revoked the will of *Westeneys*. He cited *Rob. on Wills*, 395. 2. Because the chancellor was not authorised to direct the sale at the instance of the administrator *de bonis non*, under the act of 1785, *ch. 72, s. 4.* 3. Because the appellant, not being a party to the proceedings, and claiming under no person who was a party, his title could not be inquired into in this summary way, at the instance of the purchaser, under the chancellor's decree. 4. Because in no case can process of this description be issued, unless the title to the property has been first decided by the court, and the decree directs a sale to be made of the property, and naming the property, or giving it some other certain description. This decree only directed a sale of the estate directed by the will of *J. W.* to be sold, and there is no proof in this case that *J. W.* was seized of the land now in dispute, at the time he made his will. 5. The whole proceedings under the will is erroneous, because, if the will was valid, it appears by

the proof in the case that Mrs. *Westeneys*, (formerly Miss *Steries*,) who was to have the proceeds of sale, survived her husband, and chose to hold the land.

Shaw and *Ridout*, for the appellee. [As the court did not take into view any of the points insisted on by the appellant's counsel, except that relative to the power of the court of chancery to issue the injunction referred to, the authorities referred to by the counsel for the appellee are omitted.] They insisted, that the chancellor could not do otherwise than cause possession of the premises to be delivered to the purchaser. That the appellant had not such an interest as to enable him to become a party to these proceedings, and to entitle him to an appeal. His appeal is from the issuing of a judicial process of the court, and not from the decree confirming the sale which had been made of the premises.

Magruder, in reply, was stopped by the court.

The opinion of the court was delivered by

DORSEY, J. This court, in reversing the decree of the chancellor, so far from feeling a disposition to interfere with the acknowledged jurisdiction of the court of chancery, wish to preserve it unimpaired. And in this case they think there is no authority to warrant his decision; and that the principle involved in it, would in practice not only be inconvenient, but subversive of the established modes of deciding the rights of property.

That a decree in equity for the sale of lands, to pay debts or legacies, or for the purpose of distributing the proceeds among those entitled, is a proceeding *in rem*, cannot be questioned, and that the chancellor has the power of enforcing such a decree, by ordering the possession to be delivered to the purchaser under the decree in certain cases, cannot be denied. The exercise of this power, in relation to all such persons as were parties to the proceedings, and whose rights have been determined by the decree, is essential to the full administration of justice; for as the decree, and sale under it, passes the right, it is but just and equitable that the possession should accompany it, as part of the title. And upon principle it would seem fit, that persons who come into the possession of the land *pendente lite*, claiming title to it under the parties to the bill, or some of them, should stand in the same predicament with those whom they represent in point of interest, on the ground

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that their condition cannot be better than that of those under whose authority they have obtained the possession. To send the purchaser, under a decree of the court of chancery, in such cases, to a legal forum, to clothe his title with the possession, would be denying to that court the power of efficiently enforcing rights which had passed *in rem judicatam*. But the case now before the court is essentially different. As the appellant, *Tongue*, was not a party to the original decree, his interest cannot be affected by it. Besides, he was in the possession of the land, at the time the original petition was filed, claiming, adversely to the will of *John Westeney*s, under an escheat warrant. From such a possession he could not be removed, until his title was adjudged to be defective in the regular and established course of judicial proceeding. Such an interest cannot, consistently with the principles of our jurisprudence, be the subject of inquiry, and decided on, in a summary manner, by way of motion.

It would be both unnecessary and improper, in the view which the court has taken of this subject, to decide whether the will of *John Westeney*s was revoked by his subsequent marriage, and the birth of a child, or whether the lands were escheatable. It is sufficient for us to decide, that although the court of chancery, in many instances, has jurisdiction to enforce its own decrees, by giving possession without sending the purchaser to a court of law, there to seek redress by an action of ejectment, yet that this case is not one of that description.

The court do not mean to intimate an opinion how far a third person, who comes into the possession during the pendency of the suit in equity, claiming adversely to the litigating parties, can after a decree and sale, be removed, in a summary way, at the instance of the purchaser.

DECREE REVERSED.

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WESLEY, *et al.* vs. THOMAS, *et ux.* Adm'r. of PUMPHREY.

APPEAL from a decree of the Court of Chancery. The object of the bill filed by the appellees, was to obtain the parol evidence, independent of the statute of frauds and perjuries, is inadmissible to contradict, add to, or vary, the terms of a written agreement. The court of chancery, in the exercise of its moral jurisdiction, will, upon the proof of fraud, mistake or surprise, raise an equity by which the written agreement of the parties shall be rectified. It is essential however that such fraud, mistake or surprise, should be alleged in the bill as the ground and object of the parol proof.

surrender and cancelling of a mortgage of some negroes, executed on the 29th of January 1814, by *A. Pumphrey*, the former husband of the female appellee, to *Wesley*, one of the appellants. The case is sufficiently stated in the opinion delivered by this court.

Commissions issued to take testimony, and a number of depositions were returned; and the cause having been submitted for decision,

KILTY, Chancellor, decreed, that the mortgage should be cancelled, &c. The defendant appealed to this court.

The cause was argued before BUCHANAN, EARLE, MARTIN, and DORSEY, J.

Ridout, for the appellants, contended, that the decree of the chancellor was erroneous: 1. Because parol evidence cannot be admitted to vary the terms of the deed, and to set up a consideration of a different nature from that stated in it. 2. If parol evidence were admissible, the testimony is insufficient to prove, in opposition to the positive averment of the answer, that the consideration and object of the deed were different from those which appear on its face. 3. Admitting the consideration and design of the deed alleged by the complainants to be established, there is not sufficient evidence that *Wesley* is discharged from all liability on account of the judgments which he superseded. He cited *Jones vs. Shubey*, ante vol. 5, 372. *Irnham vs. Child*, 1 Bro. Ch. Ca. 92. *Portmore vs. Morris*, 2 Bro. Ch. Ca. 219. *Hare vs. Shearwood*, 3 Bro. Ch. Ca. 168. *Lord Cheyney's Case*, 5 Coke, 68. *Rob. on Frauds*, 10, 79. *Rich vs. Jackson*, 4 Bro. Ch. Ca. 514. *Parteriche vs. Powlet*, 2 Atk. 384. *Shales vs. Barrington*, 1 P. Wms. 482. *Sugden*, 88. *Peacock vs. Monk*, 1 Ves. 128. *Preston vs. Merceau*, 2 W. Blk. Rep. 1249. *Nicholls vs. Osborn*, 2 P. Wms. 420. *Clarkson vs. Hanway*, 2 P. Wms. 204. *Chester vs. Chester*, 3 P. Wms. 51. *Stevens vs. Cooper*, 1 Johns. Ch. Rep. 429. *Clinan vs. Cooke*, 1 Scho. & Lef. 39. *Woollam vs. Hearn*, 7 Ves. 218; and *Henkle vs. Royal Exchange Assurance Company*, 1 Ves. 317.

Brice, for the appellees, relied on *Stevenson vs. Snow*, 3 Burr. 1240. 2 Bac. tit. Evidence, (G) 652, and the cases there cited. *Washburn vs. Merills*, 1 Day, 139.

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Harvey vs. Harvey, 2 Chan. Ca. 180. *Harris vs. Bishop of Lincoln*, 2 P. Wms. 135. *Rutland vs. Rutland*, *Ibid* 210. *Gillespie vs. Moon*, 2 Johns. Ch. Rep. 585. *Elliott vs. Osborn*, 1 Harr. & M. Hen. 146. *Gittings vs. Hall*, 1 Harr. & Johns. 14. *Todd vs. Rivers*, 1 Desaus. Ch. Rep. 155. *Thomson vs. White*, 1 Dall. Rep. 426; and *Ross vs. Norvell*, 1 Wash. Rep. 14.

Boyle, also for the appellees, relied on *Coke Litt.* 205, (note.) *Richards vs. Symes*, Barn. Ch. Rep. 90. *Powell on Mortg.* 187. *The King vs. The Inhabitants of Scammonden*, 3 T. R. 474. *Montague vs. Maxwell*, Prec. in Chan. 526. 1 *Stra.* 236, S. C. *Baker vs. Pritchard*, 2 Atk. 389. *Lane vs. Dighton*, Amb. 409. *Ex parte Vernon*, 2 P. Wms. 549. *Boyd vs. M. Lean*, 1 Johns. Ch. Rep. 582. *Saund. on Uses & Trusts*, 127, 134. *Rob. on Frauds*, 161; and *Thomson vs. White*, 1 Dall. Rep. 424.

Ridout, in reply, cited *Stevens vs. Cooper*, 1 Johns. Chan. Rep. 429; and 1 *Phill. Evid.* 448.

The opinion of the court was delivered by

DORSEY, J. The appellees, *John R. Thomas*, and *Catharine* his wife, filed their bill in the court of chancery against *Henry Wesley*, and others, alleging that *Aquila Pumphrey*, the former husband of *Catharine*, the female complainant, being indebted to several persons to the amount of one hundred dollars, on judgments obtained against him on warrants, applied to the defendant, *Wesley*, to join as a security in superseding the said judgments, and that *Wesley* agreed to do so on condition that *Pumphrey* would give him an indemnity. The bill then proceeds to state, that the deed of mortgage exhibited with the bill, was executed to secure *Wesley* against the payment of the said judgments, and for no other purpose. It is alleged in the bill, that the judgments were discharged by *Pumphrey*, and that the negroes mentioned in the deed of mortgage remained in the possession of the said *Pumphrey*, and the complainant, *Catharine* his administratrix, until three of them were replevied by *Wesley*. The bill prays that a writ of *ne exeat regno* may issue against *Wesley*, and his securities in the replevin bond, and that the deed may be delivered up to be cancelled.

The deed exhibited with the bill, is executed by *Pumphrey*, and in consideration of \$200 conveys to *Wesley*; and his executors, four negroes, to be defeasanced on the payment of \$200, to be paid by the bargainor to the bargainee. The defendant, *Wesley*, by his answer, denies that the deed was executed as an indemnity as alleged by the complainants, but affirms that it was given for the purpose of securing \$200 due from *Pumphrey* to him. A commission issued, under which evidence was taken by the complainants, proving that *Wesley* had in various conversations acknowledged that the deed was executed for the purpose stated in the bill, and that nothing was due to him from *Pumphrey*. The late chancellor by his decree, ordered that the deed should be cancelled, and from this decree *Wesley* has appealed; and this court are of opinion, that the decree of the chancellor must be reversed, as parol proof was inadmissible under the pleadings to reform the contract as evidenced by the deed executed by *Pumphrey* to *Wesley*. By the rule of the common law, independent of the statute of frauds and perjuries, parol proof is inadmissible to contradict, add to, or vary the terms of a written agreement. This principle is founded in the wisest policy, it guards the chastity of written contracts against all interpolations, by considering the agreement as furnishing the best evidence of the intention of the parties. It therefore shuts out all inquiry into parol proof which can give a different sense to the instrument. It has been judicially said, "that men's deeds and wills, by which they settle their estates, are laws which private men are allowed to make, and they are not to be altered, even by the king in his court of law or conscience," and the rule, as a general one, is equally applicable to a court of equity. It is most true, that the court of chancery, in the exercise of its moral jurisdiction as it has been emphatically termed, will upon the proof of fraud, mistake, or surprise, raise an equity, by which the agreement of the parties shall be rectified. To cite many cases on this subject would be useless, as fraud and mistake are acknowledged branches of equitable jurisdiction. As where on the loan of money, it was proposed that the borrower should give an absolute deed to be defeasanced by an instrument to be executed by the lender, who refused to give a defeasance after he had got possession of the deed—Lord *Nottingham*, after the

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enactment of the statute of frauds and prejudices, upon parol proof of the fraud, rectified the deed by considering it as a mortgage. 1 *Eq. Ca. Ab.* 20. *Filmer vs. Gott*, 4 *Brown's Parl. Ca.* 280. So if a clause of redemption be omitted, through fraud, to be inserted in a deed granting annuity, a court of equity would reform the agreement by parol evidence *aliunde*. *Irnham vs. Child*, 1 *Brown's Ch. Rep.* 92. The cases in which courts of equity have admitted parol proof for the purpose of rectifying mistakes in written agreements, are numerous. In *Simpson vs. Vaughan*, 2 *Atk.* 31, Lord Hardwicke, on the ground of mistake, gave relief by considering a joint bond as a joint and several one; and the same principle is established in *Bishop vs. Church*, 2 *Ves.* 101; and *Thomas vs. Frazier*, 3 *Ves.* 400 and 401. In *Baker vs. Paine*, 1 *Ves.* 457, the Lord Chancellor relieved against a mistake in articles of agreement, and his lordship observed, "how can a mistake in articles of agreement be proved, but by parol proof. It is not read to contradict the face of the agreement which the court would not allow, but to prove a mistake therein." In *Langley vs. Brown*, 2 *Atk.* 195, Lord Hardwicke says, mistakes and misapprehensions in the drawers of deeds, are as much ahead of relief as fraud and imposition. And Lord Eldon, in *Townshend vs. Strangroom*, 6 *Ves.* 328, remarks, that it would be very singular if the jurisdiction of the court should not be capable of being applied to cases of mistake and surprise, as well as of fraud.

The court do not mean to intimate an opinion how far it would be competent for a complainant, who seeks a specific execution of a contract, to offer parol proof of fraud or mistake for the purpose of proving that the parties intended to give a different sense to the instrument from that which it imports. On this point *Woollam vs. Hearn*, 7 *Ves.* 211, and *Higginson vs. Clowes*, 15 *Ves.* 516, may be consulted. But it must be remembered, that although relief can be had in equity against a deed or contract in writing, founded in fraud or mistake, still it is essential that the fraud or mistake should be alleged in the bill as the ground and object of parol proof. It is essential, on every principle of correct pleading, that that which gives jurisdiction to the court should be distinctly and substantially alleged. If you call in the aid of a court of equity to relieve against a fraud or mistake, you must aver that the contract sought to

be reformed, imports a different sense from that which the parties designed to give it, and that this was the result of fraud or mistake. The complainants should have stated in their bill the real agreement between *Pumphrey* and *Wesley*, and that through fraud or mistake the deed imports a contract different from that which the parties had entered into. It is not sufficient to state that the mortgage deed was given for the purpose of indemnifying *Wesley* against his suretyship. For if the parties voluntarily choose to express themselves in the language of the deed, they must be bound by it. From aught that appears on the face of the bill, the mortgagor and mortgagee did agree, that the deed should be executed in the form that it bears; and to permit them to prove by parol evidence a different intent, from that which they had deliberately and explicitly declared, would be to prostrate the best established rules of evidence; and under the adoption of such principles, testimony extrinsic the instrument, would in every case be admissible to substitute a new agreement in the place of the one which had been deliberately executed. See *Irnham vs. Child*, 1 Bro. Ch. Ca. 93. *Simpson vs. Vaughan*, 2 Atk. 31.

DECREE REVERSED WITHOUT PREJUDICE.

CHALMERS *et ux.* vs. CHAMBERS.

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APPEAL from a decree of the court of chancery. The case, which is fully stated in the opinion of the court, was argued at this term before BUCHANAN, EARLE, MARTIN, DORSEY, and STEPHEN, J. by

Magruder, for the appellants, and by
Winder, for the appellee.

The opinion of the court was delivered by

EARLE, J. The bill or petition in this case, states the execution of a mortgage deed by the appellants to the appellee, and the reason of its not having been recorded within six months according to the act of assembly, and it seeks to obtain a decree for recording the said deed of mortgage, and closes with a general prayer, that the complainant may have such other and further relief as his case may merit. The late chancellor decreed, unless the mort-

The relief to be given under a general prayer in a bill, must be agreeable to the case made by the bill, and not different from, or inconsistent with it.

Where a bill was filed to have a mortgage deed recorded, which had been omitted to be recorded within six months, and closes with a general prayer for other and further relief, &c. a decree that the mortgage premises be sold, &c. is not within the relief prayed by the bill.

A bill for one purpose cannot be made to answer another.

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gage money was paid, or brought into court by a limited time, that the mortgage premises should be sold for the payment of it, and he appointed a trustee to make the sale. Shall we affirm this decree of the chancellor? is the question.

The relief granted is not the special relief sought by the complainant; and if the decree is to be sustained, it must be under the general prayer for relief in the close of the bill. As to the relief to be given, under a general prayer, the rule is, that it must be agreeable to the case made by the bill, and not different from it, or inconsistent with it. The case made by the bill here, is the execution of the mortgage deed, and the omission to have it recorded, within the period prescribed by law; and the relief given, is a sale of the mortgage premises, to pay the mortgage debt. Is this relief agreeable to the case made by the bill? is the particular point to be by us decided. In forming an opinion on it, we have not much hesitation. Can that relief be said to be agreeable to a case made in a bill, which must from its nature be founded on another and a different case? A decree to foreclose and sell mortgaged premises, must be based on the nonpayment of the mortgage money, at the stipulated time, and of this the chancellor ought to be convinced when he makes the decree. It should be stated in the bill specifically, that the defendant may not be surprised, but may have an opportunity to show the mortgage money paid and satisfied. This bill was filed about the time the first instalment of the mortgage money became due, and twelve months before the residue of it was payable; and if the case set forth in the bill had apprised the defendants of the object of the complainant to foreclose and sell, they might have shown the first instalment paid, and that at the time of the filing of the bill, the complainant was not entitled to the redress asked by him; at least they might have had an opportunity of showing this, which the bill as framed deprived them of. There must have been, on the hearing of this case, a total desertion of the specific relief prayed, and under the general prayer, specific relief of another description asked, which is, wholly inadmissible. The bill made for one purpose cannot be made to answer another.

DECREE REVERSED WITHOUT PREJUDICE.

THE STATE vs. ROGERS, vs. KREBS *et al.* Garn. of HORNE.

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APPEAL from *Baltimore* county court. The cause, which is sufficiently stated in the opinion delivered by this court, was argued at June term last before BUCHANAN, EARLE, and STEPHEN, J.

Williams, for the appellant. 1. The subsequent acquisitions of *Horne* were not discharged from a liability to be taken in execution under the judgment against him, on which the attachment in this case issued, by *Horne's* release under the general insolvent laws; both because the bond, on which the judgment was obtained, was executed before the passage of those laws, and because his release was only of his person. 2. His release, under a special insolvent law, has not the effect to discharge his future acquisitions, because that law, and the general laws to which that law refers, were passed *subsequent* to the execution of the bond, on which the judgment was obtained. 3. Under the decision of the supreme court of the *United States*, a discharge, in pursuance of a state insolvent law, cannot constitutionally have the effect to release the future acquisitions of an insolvent petitioner. 4. The judgment rendered in this case was not made subject to *Horne's* discharge under the insolvent law, but was an absolute judgment. 5. The money arising out of the sale of the real estate of Mrs. *Horne*, by the commissioners under the act to direct descents, was personal property, and belonged to her husband, and, as his property, was consequently liable to be taken in execution for the satisfaction of a judgment obtained against him. (a)

This court adopting the decision of the supreme court, the last point only is necessary to be attended to, and it is the principal point in the case. The funds attached in the hands of *Krebs*, and others, were a subsequent acquisition of personal property by *Horne*, except to the value of his tenancy by the curtesy, which belonged to his trustee. The real estate of his wife was sold pursuant to the acts to direct descents. It is converted into *personal* property; for by those acts there is nothing in them which ex-

This court has adopted, and considers its-elf bound by the decisions of the supreme court of the *United States* respecting the state insolvent laws. (note)

Where the real estate of a *feme covert* is sold under the act to direct descents, the mutation of her estate from real to personal is complete when the commissioners' sale is ratified by the court, and the purchaser has complied with the terms of it, by paying the money, if the sale was for cash, or by giving bonds to the representatives, if the sale was on a credit.

The bond passed to the wife by the purchaser is a *chose in action*, as is the money in the hands of the commissioners, if withheld from her; both liable to be sued for and recovered by the husband alone.

The money thus in the hands of the commissioners may be attached by the husband's creditor to satisfy a debt due by him. The money, being at the disposal of the husband, is in truth and in law his, and is liable for his debts, and can never be enjoyed by the wife but upon the single contingency of her surviving her husband before an appropriation is made of it by him.

(a) BUCHANAN, J. This court has adopted, and considers itself bound by the decision of the supreme court of the *United States*, respecting the state insolvent laws,

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emptys such proceeds from becoming personal property, the moment the land is sold and paid for—1786, *ch. 45, s. 8*. When it becomes the personal property of the wife, *eo instanti* it becomes the personal property of the husband; and as such, becomes liable to all the incidents his personal property is subject to, and consequently to that of being attached to pay his debts. The commissioners are the husband's agents, or his stakeholders, for this collection. The purchaser has paid over the money to them, and they have made the deed. The instant the legal interest has passed from the commissioners, and they have received the money, they are clearly his depositaries of the money. It is an acquisition subsequent to his release, because, when he applied for the benefit of the insolvent law, and executed a deed to his trustee, all the interest which he had in his wife's real property was an eventual tenancy by the curtesy. Property in the hands of a sheriff may be attached.—*Davidson vs. Clayland, Garn. of Blake*, 1 *Harr. & Johns.* 546. *Campbell vs. Morris*, 3 *Harr. & M'Hen.* 556. Decisions have been made in our court of chancery of the real estate having been converted into money, and became personal property. This was done in the case of *John Spurrier's* estate in 1813, and in that of *Price's* estate. In *Spurrier's* case, the wife of one of the claimants died after the decree, and one of the sales under it, yet the chancellor directed the whole proceeds to be paid to the husband.

R. Johnson, for the appellees. The fifth question may be divided into two branches—1st. Whether the funds in dispute are the personal property of the husband; and if so, 2d. Whether they are liable to attachment under the act of 1715, *ch. 40*?

1. The act of 1786, *ch. 45*, never intended to deprive the wife of her real estate, or the proceeds of it. The case of *Spurrier* was under the act of 1785, leaving it discretionary with the chancellor to appropriate the fund for the advantage of the parties concerned. The county court of *Prince-George's (Gantt, Ch. J.)* decided, in the case of *Duckett's* estate, that the proceeds of the real estate, under the act of descents, should be considered as real estate. Courts of equity will not let the husband get possession of money of the wife, unless he will give secu-

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rity to settle it on the wife. 1 *Fonbl.* 95, (note K.) Suppose in this case *Horne* had applied for the money, would not *Baltimore* county court, being a court of equity, have compelled him to give security to settle it on the wife? *Attorney General vs. Whorewood*, 1 *Ves.* 548. *Adams vs. Pearce*, 3 *P. Wms.* 13. If *Horne* could not get the money without security, or settling it on his wife, then his creditors could not affect it in this way. In *Davidson vs. Clayland*, the surplus of the money remaining, after satisfying the *fieri facias* under which land was sold, was considered as land. The act of 1786 directs, that the money shall be divided among the heirs according to their titles to the estate. The interest of the tenant by the curtesy was valued at ten dollars; and his wife had an interest in one fourth of the purchase money, subject to the payment of the ten dollars.

2. If it was the personal property of the wife, and the husband could get possession of it, does it follow that it can be attached? It was a *chose in action*, and it was discretionary with the husband whether or not he would reduce it into possession. 2 *Blk. Com.* 434. If he does not, no other person can do it for him. Suppose this a note to the wife, and the husband had not chosen to turn it into possession, could the creditor do so by any proceeding? It is similar to a devise of an estate to A, on condition he changed his name. The act of 1798, *ch.* 101, is different from the statute of *Charles*. The husband, in *England*, has the right to administer on his wife's estate; and if there is a *chose in action*, not reduced into possession, it devolves on the wife's representatives. But under the act of 1798, if the husband does not take possession of the *choses in action* of his wife, they devolve on her representatives. This fund is in the hands of the commissioners, who are officers of the county court. There is no order for them to pay over the money. This case is not different from that of *Sowers vs. The State use Schell*, decided by this court. There is nothing to show that *Baltimore* county court would decree to *Horne* any part of the money. The funds are in the hands of the commissioners, and they are responsible for them to the court.

Williams, in reply. The last point is a matter of fact. The proceeding was not before *Baltimore* county court as

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a court of equity, it was under the act to direct descents. The sum and proportions have been ascertained by the county court. But it is said to be a *chose in action*, and not liable. Creditors may pursue a *chose in action*. A *chose in action*, arising after the marriage, is reduced into possession, and is not similar to a *chose in action* before marriage. The cases in *Fonblanque*, *P. Williams*, and *Vesey*, are equitable cases of proceeds from the wife's estate. The application must be resisted by the wife or the children, or the money is paid over to the husband. That was not done here. By the act of 1786, *ch. 45, s. 8*, if the money was to have been considered as real estate, it would have been so stated. By the act of 1816, *ch. 154, s. 9*, the legislature has declared, that the money alluded to by that act is to be considered as real estate. Why not have said so in the act of 1786, if it was so intended? There can be no distinction between sales under the act of 1785, and that of 1786. Neither of them say the proceeds shall be considered as real estate.

Cur. adv. vult.

At this term the opinion of the court was delivered by EARLE, J. In this cause there was a *pro forma* decision by Baltimore county court on a case stated. Among other things, very foreign to the subject in controversy, the case in substance states, that in the year 1804 *Elizabeth Young*, wife of *Joseph Young*, *Mary D. Horne*, wife of *John S. Horne*, and *Rebecca Barney*, wife of *William B. Barney*, became entitled, by descent, to a certain undivided real estate, situate within the city of *Baltimore*, as heirs at law of their father, *Charles Ridgely*, and that *Rebecca Barney* died intestate of her undivided part thereof, in 1807, leaving three infant children, *Joshua Barney*, *Charles Barney*, and *Rebecca Barney*; that on the 27th day of April 1816, *Joseph Young*, and *Elizabeth* his wife, petitioned *Baltimore* county court for a division of the said real estate, according to the act of assembly entitled, "An act to direct descents," and the several supplements to the said act; and thereupon the appellees, *William Krebs*, *George Warner*, and others, were appointed commissioners for the purposes in the said laws prescribed, who reported to the court that the real estate would not admit of a division among the heirs, without loss and injury to them; that the said report was ratified by the court,

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and none of the heirs having elected to take the said real estate at the value set thereon by the commissioners, the court directed the said commissioners to make sale of the same; who, pursuant to the directions of the court, did sell the real estate for the sum of \$3,391 29, expenses deducted, which sale being approved of, the purchase money was accordingly received into their hands, between the months of August 1816 and May 1817, one third of which sum was paid over by the commissioners to *John Young*, and *Elizabeth* his wife, one third thereof to *William B. Barney*, as surviving husband and guardian of the infant children of *Rebecca Barney*, and the remaining third is still in the hands of the commissioners, subject to certain deductions agreed on by the appellant and appellees. The case also states, that in the year 1805, *John S. Horne* took out letters of administration on the estate of *Samuel R. Rogers*, with the will of the said deceased annexed, and in due form executed an administration bond, in the penalty of \$30,000, on which bond a suit was instituted against the said *John S. Horne* in *Baltimore* county court, to September term 1815, in the name of the state at the instance and for the use of *Robert Rogers*, the sole legatee of *Samuel S. Rogers*, and that an absolute and unconditional judgment was obtained in said suit against the said *John S. Horne*, at September 1817, for the sum of \$8,820 93 and costs. The case further states, that on the 15th day of December 1817, the writ of attachment in this cause, upon the judgment aforesaid, was issued, and was laid in the hands of the commissioners, between the issuing of it and the 12th day of March 1818, to affect the property or credits of the said *John S. Horne*, no part of the money arising out of the sale of the said *Mary D. Horne's* real estate having been paid over, but being then in the hands of the garnishees, the appellees in this cause.

On this statement of facts the question is made, whether the attachment is sustainable? It was decided in the court below against the attachment, and we are now called on to review the decision, and if necessary, to correct it.

In reflecting on this subject, the first doubt that arises in the mind is as to the nature of this property of the wife in the hands of the commissioners. It is in fact money, but the point of hesitancy is, whether in legal contemplation it is to be so considered? No discrimination is made by

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the descent laws, between the interest of a *feme covert*, and that of any other heirs of the intestate. Those laws direct the commissioners, who have sold for cash, after the ratification of the sale, and the deduction of the expenses to be ascertained by the court, to divide justly the purchase money among the several persons interested, according to their respective titles to the estate; and when the estate is sold by the commissioners on a credit, bonds are to be taken by them for the purchase money, to each representative respectively, according to his or her proportional part of the nett amount of sales. The *feme covert* is treated like the other heirs, and it is to be presumed her property, after sale, assumes the same character as theirs. The money is to be paid to her as heir in the one case, and the bond is to be passed to her in the other, according to the injunctions of the act of assembly. A change in the nature of her property is thus operated by the sale of the commissioners, but the point of time when the change takes place, is a question of interesting consequence to the relative rights of her and her husband. Upon this question the court have deliberated, and we think that the mutation of her estate from real to personal may be determined to be complete when the commissioners' sale is ratified by the court, and the purchaser has complied with the terms of it, by paying the money, if the sale is for cash, or by giving bonds to the representatives, if the sale is on a credit. The bond passed to the wife by the purchaser is a chose in action, as is the money in the hands of the commissioners, if withheld from her; both liable to be sued for and recovered by the husband at his pleasure. But a difficulty was urged in argument to the recovery of the money in this case by the husband, and it was said that the court, where the sale of the wife's land was effected, would not permit him to receive the proceeds of the sale, without making a provision for his wife. To this it is to be answered, that the distribution of the money appears to have been made by the commissioners, and not to have been brought into the county court; and it is admitted in the statement, that the money of *Mary D. Horne* is still in the hands of the commissioners, ready to be paid to the person best entitled to it. To recover the money of the commissioners in such a case, the husband's remedy would be by a suit in a court of law, and the principle seems to

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be a settled one, that wherever a husband can come at the estate of the wife, without the aid of the court of chancery, that court cannot interfere in her behalf. See *Attorney-General vs. Whorwood*, 1 Ves. 539. *Hargrave & Thomas's Co. Litt.* 310. In what light we consider a county court, ordering a sale of real property under the descent laws, we do not mean to suggest; it is enough for us to say, that in this case the money was not brought into Baltimore county court, and that that tribunal had not an opportunity of exerting its authority over the subject, either as a court of equity or as a court of law.

We have already said, that where a bond has been passed to the wife, for the proceeds of the sale of her real estate sold by commissioners, or where a sale has been made for cash, and the money has been received and is withheld by the commissioners, the husband may sue for and recover those debts at pleasure, of the purchaser in the first case, and of the commissioners in the last. In the action in either case, he may join his wife with him, or the husband may sue alone at his election. That a husband may in his own name sue a bond passed to him and wife, or to the wife alone during coverture, there are many authorities to show, independent of the act 1798, *ch.* 101; and it is equally certain, that he may sue alone for a breach of promise made to him and his wife, after coverture, or to the wife only, to pay a sum of money to her. For the first position, see *Ankerstein vs. Clarke*, 4 T. R. 616, and *Philliskirk vs. Pluckwell*, 2 Maule & Selw. 396; and for the last, see *Hilliard vs. Hambridge*, *Aleyn's Rep.* 36, and *Prat vs. Taylor*, Cro. Eliz. 61. 1 Schw. N. P. 245. If the husband may sue alone, where an express promise is made to the wife, after coverture, what good reason can be assigned why he could not sue in the same way on a promise to the wife raised by implication of law, as in this case, had it been against the commissioners for the money had and received by them? The express promise, and the promise implied, are of the same character, as to the husband's claims, and resting upon similar principles, they ought to be adjudicated on in the same way. Let the law be considered as settled, that the husband may sue in his own name for money situated as this is in the hands of the commissioners, and it seems to follow necessarily, that it may be attached by the husband's creditor, to satisfy a debt due by him. If the commissioners and

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garnishess here had plead *nulla bona* on the trial of the issue, it would have been competent to the plaintiff to give evidence of the wife's money in their hands, and it would have been sufficient to have sustained his case. The money being at the disposal of the husband, is in truth and in law his, and is liable for his debts, and can never be enjoyed by the wife but upon the single contingency of her surviving her husband, before an appropriation is made of it by him.

The judgment below we think ought to be reversed.

JUDGMENT REVERSED.

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WATKINS vs. HODGES and LANSDALE.

Where there is a subsisting special agreement, a party to it cannot recover on general counts; he must declare on the special agreement, and that being the gist of the action, it must be stated in the declaration.

A declaration on a special agreement must state all the essential parts of the agreement.

Where an agreement formed an entire contract, to enable the plaintiff to recover on it, he must prove a performance or tender to perform every thing required by it on his part to be performed.

If a contract be rescinded by the parties after its part performance by the plaintiff, he may recover for the part performance on a general count.

A subsequent parol agreement to postpone the delivery of articles under a contract without seal, is not a waiver of the contract, but only an enlargement of the time for its performance.

APPEAL from *Baltimore* county court. *Assumpsit* by the appellant against the appellees. The declaration contained four counts: The *first* for goods sold and delivered. The *second* on a *quantum meruit* for goods sold and delivered. The *third* on an *insimul computassent*; and the *fourth* on a special agreement. The last count is as follows, viz. "And whereas heretofore, to wit, on the 3d of February 1813, the defendants bargained for and bought of the plaintiff, and the plaintiff, at the special instance and request of the defendants, then and there sold to the defendants, at the county aforesaid, a large quantity, to wit, sixty hogsheads of tobacco, whereof 45,000 weight was to be crop and 15,000 weight second tobacco, at the rate or price of three dollars for every hundred weight of the crop or first quality tobacco, and two dollars and fifty cents for every hundred weight of the second quality tobacco, and also one dollar for each cask containing the same, to be delivered by the plaintiff to the defendants, and inspected at *Beard's* warehouse in *Anne-Arundel* county, viz. at the county aforesaid, on or before the tenth day of May then next ensuing, and to be paid for by the defendants on the twenty-fifth day of December then next ensuing; and in consideration thereof, and that the plaintiff at the like special instance and request of the defendants, had then and there undertaken, and faithfully promised the defendants, to deliver the said tobacco at the time and place aforesaid, they the defendants then and there undertook, and faithfully promised the plaintiff to

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accept the said tobacco of him the plaintiff, and to pay him for the same on the day aforesaid; and although the plaintiff afterwards, and before the tenth day of May then next ensuing as aforesaid, viz. on the fifteenth day of March, at *Beard's* warehouse in *Anne-Arundel* county, to wit, at the county aforesaid, did deliver to the defendants eleven hogsheads of crop tobacco, amounting in the whole to 10,239 weight, and ten hogsheads of second tobacco, amounting in the whole to 9025 weight of the same, together with 21 casks containing the same; and although the plaintiff was ready and willing, and then and there offered and tendered to deliver the balance or remaining part of said sixty hogsheads of tobacco, so as aforesaid contracted for, to the defendants, and then and there requested the defendants to accept the same; yet the defendants, not regarding their said promises and undertakings, did not, nor would, at the said time when they were so requested, or at any time before or afterwards, accept the balance or remaining part of the said sixty hogsheads of tobacco, of and from him the plaintiff, neither have they, nor either of them, paid the plaintiff for the whole of the said sixty hogsheads of tobacco, or for the twenty one hogsheads delivered to them, or for any part or parcel of said tobacco, but then and there wholly refused and neglected so to do, and do still refuse to pay the same. Nevertheless," &c. The general issue was pleaded, and at the trial the plaintiff proved the delivery of twenty-one hogsheads of tobacco, eleven of which were at three dollars, and the residue at two dollars and fifty cents per *hogshead*, on or about the latter part of March 1813. The defendants then offered in evidence a special agreement, which was admitted to be in the hand writing of the plaintiff, and is in these words: "I have this day sold to Messrs. *Hodges* and *Lansdale* 60 hogsheads of tobacco, (of my make and now on hand,) 45 thousand weight of it crop, and 15 thousand weight second, at \$3 per hundred for the crop, and \$2½ per hundred for the second, and one dollar for each cask, to be paid for on the 25th day of December next. The tobacco to be delivered and inspected at *Beard's* Point warehouse between this and the 10th of May next.

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The defendants also offered in evidence the deposition of *George Allen*, taken by consent, who proved, "that early in April 1813, he was requested by *Hodges* and *Lansdale* to bring up in his boat the tobacco purchased by them of *Nicholas Watkins*; that they delivered to him a letter dated the 3d April 1813, directed to *Watkins*; that he accordingly called on *Watkins*, and delivered the letter to him about three days after the date of it; that *Watkins* told the deponent, there were 21 hogsheads of tobacco at *Beard's* warehouse which he wished him to carry to *Lansdale* and *Hodges*, the balance of the tobacco purchased by them he could not deliver, being too busy at that time on the farm; that when the deponent returned he would haul him a load down; that the deponent expected to be back in about a week from that time, and the load would be from 40 to 43 hogsheads. This deponent further states, that when he was coming up, the *British* were in the bay, and were close behind him." The letter mentioned and referred to in the foregoing deposition, dated at *Baltimore* the 3d of April, 1813, and directed to the plaintiff, is hereinafter set forth. The defendants further offered in evidence the deposition of *Richard Welsh*, taken by consent, who proved, "that late in the fall of 1813, he was at the plaintiff's tobacco house, where he was getting out wheat; that whilst there, *Wm. M. Lansdale*, one of the defendants, rode up, and requested the plaintiff to deliver the tobacco, or the balance of the tobacco, this deponent does not precisely recollect which, and that the plaintiff replied that he could not deliver it, as he was busy in getting out his wheat, and that his family depended on that for their living." The defendants also proved, that a quantity of tobacco, about 40 hogsheads, was sold by the plaintiff at a much higher price in the spring of 1815. The plaintiff then offered in evidence the three following letters, admitted to be in the hand writing of the defendants, and addressed to the plaintiff, viz. 1st. "*Baltimore*, 9th March 1813. Dear Sir, We have authorised *Mr. Harrison* to send up your tobacco in his boat, and will thank you to deliver it to him as fast as possible. You will oblige us if you will carefully take the samples of all you have to inspect, and send them by the boat." 2d. "*Baltimore* 3d April, 1813. Dear Sir, We wish you to forward by capt. *Allen* as much of your tobacco as he can receive. As the balance of your crop is now to inspect, you will

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oblige us by taking samples of every hogshead, and sending with the tobacco. From what we can see through the heads of those here, we think them nothing extraordinary, and hope the yellow is all to come. You will please to dispatch capt. *Allen* as soon as possible." 3d. *Baltimore*, 9th April, 1813. Dear Sir, The alarming news received to day makes it necessary for me to countermand the orders I gave capt. *Allen* respecting your tobacco. You will on the receipt of this, stop carrying down another hhd. of your tobacco, and if the capt. has any on board, you will particularly oblige me by telling him to have it put back in the shed of the warehouse, and wait to receive from us further orders." On these facts the defendants moved the court to direct the jury, that the plaintiff was not entitled to recover; which direction the court, [*Hanson and Ward, A. J.*] gave to the jury. The plaintiff excepted, and verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, MARTIN, and STEPHEN, J.

Magruder, for the appellant. It is contended, on the part of the appellant, that for the 21 hogsheads of tobacco proved to have been sold and delivered by him to the appellees, he was entitled to recover. Evidence was given at the trial, that part of the tobacco was delivered. The appellees, by their letter of the 9th of April 1813, countermanded their previous orders, and directed that the balance should not be sent *until further orders* from them. No further orders were given by them until the fall of the year. The appellant was under no obligation to deliver the tobacco until it was paid for. The appellees should have tendered payment. The appellant can recover for the tobacco delivered, and the appellees' right of action against the appellant is for the nondelivery. The last letter of the appellees did away the contract. If the appellees had sued the appellant for nondelivery, they could not have founded their action on the contract. They cannot set off the nondelivery of the tobacco in this action.

Heath, for the appellees. A written contract was entered into between the parties on the 3d of February 1813, whereby the plaintiff in the court below was to deliver to the defendants at *Beard's* warehouse, 60 hogsheads of tobacco of the plaintiff's make, and on hand, 45,000 of it to

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be crop, and the residue second tobacco, at stipulated prices, to be delivered between that day and the 10th of May following, to be paid for on the 25th of December following. Part of the tobacco was delivered, and on the 9th of April the defendants order a suspension of the delivery of the tobacco, in consequence of the arrival of the enemy in the bay, to which the plaintiff does not object. In the autumn they requested a delivery of the residue of the tobacco, which the plaintiff declines, but subsequently sells it, and brought this action. 1. The declaration contains four counts, three general, and one special. On neither of them was he entitled to recover. General counts cannot be proper where there is a special contract still existing and unexecuted. *Weston vs. Downes*, Doug. 23. *Power vs. Wells*, Cowp. 818, recognized in *Towers vs. Barrett*, 1 T. R. 133. It is not pretended that this contract has been executed by the plaintiff. It has not been rescinded or annulled, as the acts of the parties prove. No intention was indicated by the defendants to rescind or annul it, if indeed they could, but one party cannot rescind a contract except where, by the terms of it, privilege is given to do so. *Hunt vs. Silk*, 5 East, 448. 1 Pow. on Cont. 412. The plaintiff acquiesced in the suspension; he made no objection to or refusal of it, and gave no notice to the defendants that he considered the contract rescinded. The contract here is in part executed, and the parties could not be placed in their original situation. Where that is the case general counts cannot be supported. *Giles and others vs. Edwards*, 7 T. R. 178. This was nothing more than a suspension of time for the delivery, which was not important. Change of the time does not create a new, or annul the old contract. *Cuff and others vs. Penn*, 1 Maule & Selw. 21. This contract then is unexecuted and still open, of course upon the general counts the plaintiff cannot recover.

2. The special count is bad on three grounds—1st. Because of a variance between the contract declared on and that proved. 2d. Because of a variance between the breach alleged and that proved; and 3d. The tender is not alleged to have been made at the proper time. 1st. As to the first variance—The declaration states the contract to be for 60 hogsheads of tobacco, and the proof is 60 hogsheads of the plaintiff's make, and on hand. This is a sub-

stantial variance. There was a good reason operating with the defendants for the insertion of the words, that the tobacco should be of the plaintiff's make, and then on hand. *Anonymous*, 1 *Ld. Raym.* 735. *Penny vs. Porter*, 2 *East*, 2, (note.) *Brown vs. Knill*, 2 *Brod. & Bring.* 395, (6 *Serg. & Low.* 167.) *Bull. N. P.* 145. 2d. The plaintiff in his declaration avers a tender, and there is no such proof; but the proof is directly the reverse. Where a tender is averred, it must be proved. *Jones vs. Barkley*, 2 *Doug.* 694, per *Buller*, J. *Chitty's Plead.* 318. 1 *Schw. N. P.* 94, 95, 96, 99, 100. "I am ready to pay the debt or to perform the duty," is no tender. 6 *Bac. Ab. tit. Tender*, &c. (B 1.) 447. The party must do every thing necessary, &c. *Clark vs. Tyson*, 1 *Stra.* 504. 3d. The tender as averred was not in proper time. *Cro. Eliz.* 73. *Plowd.* 172, 174. 12 *Mod.* 421. *Lancashire vs. Killingworth*, 1 *Ld. Raym.* 686. The contract here is, that the money was to be paid after the delivery of the tobacco; the tobacco was to be delivered before the 10th of May, and it was to be paid for in December following. The party must aver and prove performance; this is a condition precedent. *Thorpe vs. Thorpe*, 1 *Salk.* 171, and 1 *Ld. Raym.* 666. *Pordage vs. Cole*, 1 *Saund. Rep.* 320, (and notes.) The postponement of the delivery of the tobacco does not destroy the contract. *Cuff and others vs. Penn*, 1 *Maule and Selw.* 21. *Morrison vs. Galloway*, in this court, at December term 1809.

Magruder, in reply. The plaintiff did not rely on his last count in the declaration. The court directed the jury that he could not recover on any of the counts. He may recover for the value of the tobacco delivered. The only question is, whether there is any thing in the contract which prevents a recovery after the letter of the 9th of April 1813 was received by the plaintiff? The tobacco delivered was in strict compliance with the contract. Where a contract has been partly performed, it may be so situated as not to be fulfilled, and yet the party may recover so far as he has performed. The letter amounted to a waiver of the contract. It was similar to a contract to build a house, where there is an alteration in the plan. The alteration is a waiver, and the workman may recover for the work done. So here, as far as the tobacco was delivered, the plaintiff may recover.

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The opinion of the court was delivered by
MARTIN, J. This is an action on the case, instituted by the plaintiff to recover the price or value of twenty-one hogsheds of tobacco, sold and delivered to the defendants. The declaration contains four counts. 1st. A general *indebitatus assumpsit*. 2d. A *quantum meruit*. 3d. An *insimul computassent*. And 4th. On a *special agreement*. The plaintiff offered evidence to prove the delivery of twenty-one hogsheds of tobacco to the defendants, some time in March 1813. The defendants then read to the jury a special agreement, admitted to be in the hand writing of the plaintiff, in the following words: "I have this day sold to Messrs. Hodges and Lansdale 60 hhds. of tobacco, of my make, and now on hand, 45 thousand weight of it crop, and 15 thousand weight second, at \$3 pr. hundred for the crop, and \$2½ pr. hundred for the second, and \$1 for each cask, to be paid for on the 25th day of December next; the tobacco to be delivered and inspected at *Beard's Point* warehouse, between this and the 10th of May next. 3d. Feby. 1813.
Nicholas Watkins of Thos."

It is an established rule of law, that where there is a subsisting special agreement, a party to it shall not recover on general counts. He must declare on the special agreement, and that being the *gist* of the action, it must be stated in the declaration. *Weston vs. Downes*, Doug. 23. *Hulle vs. Heightman*, 2 East, 145. 1 Esp. Dig. 263, (139.) If then this contract was in force between the parties, the plaintiff could not recover in this action. He could not recover on the three first counts, which are general, nor on the fourth. For altho' it is founded on the special agreement, it has omitted some of its essential parts. The agreement is, that the tobacco sold and to be delivered, "*should be the make of the plaintiff, and on hand at the time the contract was made.*" This is an important stipulation on the part of the plaintiff, and not mentioned in the declaration. But if the declaration had strictly pursued the agreement, the plaintiff was not entitled to recover from the evidence. The agreement formed an *entire* contract, and to enable the plaintiff to recover on it he must prove a performance, or tender to perform every thing required by it on his part to be performed, *Cutter vs. Powell* 6 Term.

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Rep. 520. The agreement is, that he shall deliver sixty hogsheads of tobacco to the defendants by the 10th of May 1813; the evidence is, that he delivered twenty-one hogsheads in March, and no attempt is made to show a delivery or tender of the balance.

If the original contract was rescinded by the parties, after a part performance of it by the plaintiff, either by waiving the performance of the residue of the contract, or entering into a new one, so inconsistent with the first, that they could not stand together, the plaintiff might recover for the part performance on a general count. To bring himself within this principle of law, he offered three letters from the defendants in evidence to the jury, the last of which only, dated the 9th of April 1813, is connected with this part of the case. In that letter he states, "the alarming news received to day makes it necessary for me to countermand the orders I gave capt. *Allen* respecting your tobacco. You will, on the receipt of this, stop carrying down another hogshead of your tobacco, and if the capt. has any on board, you will particularly oblige me by telling him to have it put safely back in the shed of the warehouse, and wait to receive from us further orders." Here then is a proposition, on the part of the defendants, that the plaintiff should not deliver the tobacco by the time stipulated in their contract, but that he should keep it until they demanded a delivery of it. Whether the plaintiff assented to this proposition, was a fact, under a different course of proceedings, that ought to have been submitted to the jury, and evidence was offered to prove that he did assent to it. But it is perfectly immaterial in this case, for it has been frequently determined, that a subsequent parole agreement to postpone the delivery of articles under a written contract without seal, is not a waiver of the contract, but only an enlargement of the time, for the performance of it. In *Warren vs. Stagg*, referred to in 3 *Term. Rep.* 591, *Buller, J.* held, that an agreement to extend the time for the performance of a contract, was not a waiver, but a continuance of the original contract. In *Keating vs. Price*, 1 *Johns. Ca.* 22, the same doctrine was maintained by the court. That was an action founded on a special agreement in writing, by which the defendant promised to deliver to the plaintiff a quantity of staves, on or before the 1st of May 1796. *Parole evidence* was offered to prove the ac-

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knowledge of the plaintiff, that he had made the contract as before stated, but that he had agreed to extend the time for delivering them, until the next spring. A verdict was taken for the plaintiff, subject to the opinion of the court on several points, and among others, whether the time of performing the contract could be extended by a subsequent agreement between the parties. The court said this being originally a *simple* contract, it was competent for the parties to enlarge the time of performing it. An extension of the time may often be essential to the performance of executory contracts, and there can be no reason why a subsequent agreement for that purpose should not be valid; and directed a nonsuit to be entered. So also in the case of *Cuff & others vs. Penn*, 1 *Maule & Selw.* 21, an action was founded on a special agreement *in writing*, by which the plaintiffs stipulated to deliver to the defendant a quantity of bacon at certain times particularly mentioned in the agreement. After a part of the bacon had been delivered under this contract, a parole agreement was made between the parties, that the time for the delivery of the residue should be extended. The plaintiffs, after the time had elapsed at which they were to deliver the bacon under the contract in writing, tendered the residue to the defendant, who refused to receive it, alleging the first contract was at end. But Lord *Ellenborough* determined that the subsequent parole agreement did not substitute a new contract, in the place of the first, but was a dispensation only with the performance of the original contract, in respect of the delivery of the bacon at the stipulated times, and this was confirmed by the court, on a motion to enter up a nonsuit. The plaintiff, in the case now before us, if he did not consent to the enlargement of the time stipulated in the written contract, ought to have delivered the tobacco, or tendered a delivery, on or before the 10th of May 1813. If he did assent to extend the time he ought then to have delivered it, or made a tender, at some subsequent period, and his declaration ought to have contained a count setting out the contract, and a performance, or tender to perform, on his part.

JUDGMENT AFFIRMED.

TOWSON vs. THE HAVRE-DE-GRACE BANK.

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JUNE.

APPEAL from *Baltimore* county court. The plaintiffs (now appellees,) brought an action on the case against the defendant, (the appellant,) being an innkeeper, for the loss of goods, &c. The declaration states, "That whereas, according to the law and customs of this state, innkeepers, who keep common inns to entertain persons travelling by, or sojourning at the places where such inns are kept, by day and night, are to keep and preserve such guests and their money, goods and chattels, and also the money, goods and chattels, of any other citizens or bodies politic of this state, being in the lawful custody of such innkeepers in such inns. And whereas the defendant, on the 27th of September, 1816, and long before and afterwards, was an innkeeper, and held a common inn in the city of *Baltimore*, to wit, at the county aforesaid, to entertain persons travelling there, and sojourning in the said inn, and one *John Hogg*, who was in this transaction the servant of the plaintiffs, then possessed of a large sum of money, to wit, the sum of \$1000 in bank notes, the property of and belonging to the plaintiffs, and travelling in the said county, and so sojourning in the said inn of the defendant, the same day and year aforesaid, then and there delivered into the lawful custody of the defendant the said sum of money in bank notes, to wit, \$1000, belonging to the plaintiffs as aforesaid, and which said sum of money the defendant then and there had in his lawful custody in the said inn. Yet some malefactor, resorting to or harboured in the said inn, afterwards, to wit, on the 28th of September, in the year aforesaid, by default and negligence of the defendant, and by the default, negligence, or fraud of his servants, or some one or more of them, took and carried away the said sum of \$1000 in bank notes, then and there being in the said inn, and in the lawful custody of the defendant, to wit, at the county aforesaid, and other wrongs to the plaintiffs then and there did, against the laws and customs aforesaid, to the damage of the plaintiffs \$1500; and therefore they bring suit, &c."

If a bank delivers to JH notes of the bank, with a request to pass them away for the benefit of the bank, or if that could not be effected, to return them, which he agreed to do, he was, *quo ad hoc*, the servant of the bank.

Common innkeepers, without any particular contract or agreement for that purpose, are answerable for all losses in their inns, happening either by the acts or negligence of themselves or their servants, to travellers and guests received by them; and if a servant is robbed of his master's money or goods, the master may maintain an action against the innkeeper in whose house the loss was sustained.

Innkeepers are answerable, by reason of the profit arising either from the keeping of the horses, &c. of their guests, or from entertaining of the guests themselves, in the case of money or other property, from the keeping of which alone no profit can arise. It is the profit which alone creates his liability, and it matters not out of whose funds the expenses of the guest are defrayed.

An objection that the allegation in the declaration is of the loss of money in bank notes, and that bank notes are not money, cannot be sustained.

An innkeeper is only answerable for money, or other dead property lost in his inn, where the party losing it was a guest at the inn at the time of the loss.

In an action against an innkeeper for the loss of dead property in his inn, it is necessary to set out in the declaration that the plaintiff was a guest at the inn at the time of the loss.

Where a charter incorporating a bank reserves for the use and benefit of the state certain shares of the capital stock, to be subscribed for in such manner as the legislature may direct, and also provides that any director, &c. holding any shares therein, who shall commit any fraud, &c. shall be liable to prosecution by indictment in the name of the state; it is a public law, and must be judicially taken notice of as all other public laws.

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The defendant pleaded the general issue; and on the facts given in evidence at the trial, which are fully stated in the opinion delivered by this court, the defendant prayed the opinion of the county court, and their direction to the jury, that the plaintiffs were not entitled to recover. Which opinion and direction the court, [*Dorsey*, Ch. J. and *Ward*, A. J.] refused to give. The defendant excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, MARTIN and STEPHEN, J.

Winder and *R. Johnson*, for the appellant, contended; that the judgment ought to be reversed—1. Because there was no averment in the declaration that at the time, the bank notes, for whose value this action was brought, were taken out of the appellant's inn; *Hogg*, who the appellees state to have been their servant, was abiding in the inn as a guest. 2. That *Hogg* was not such a servant of the appellees as entitled them to maintain this suit. 3. Because the appellees were not bound to the appellant for *Hogg's* expenses at the inn, nor answerable to *Hogg* for the same. 4. That where goods in the possession of a traveller for his own use and benefit, either on loan or hire, are deposited by him with an innkeeper where he may sojourn, and the goods are stolen, will not entitle the lender or hirer to an action against the innkeeper on the custom. 5. That an innkeeper in *Baltimore* was not bound to be the depository of money, with which a traveller might be in possession, on account of another; and that the loss of money, so deposited, would not give an action on the custom to the owner of the money. 6. Because the property alleged to have been in the possession of *Hogg*, and lost in the appellant's inn, was not legally and sufficiently described in the declaration, it being called a *sum of money* of \$1000 in *bank notes*, and throughout the declaration treated as *money*; and the declaration did not state of what bank the notes were made by, nor the number of them, nor the amount for which the several notes were made. 7. That there was no evidence that the plaintiffs had a right to sue. On the *first point* they contended, that the plaintiff must state in his declaration every material thing necessary to his action. They referred to 5 *Bac. Ab. tit. Pleas &*

Pleadings, (B) 329, 332, 333, 346. *Pinkney vs The Inhabitants*, &c. 3 *Saund.* 379, (note 13.) *Fontleroy vs. Sylmer*, 1 *Ld. Raym.* 239. An action against an innkeeper is founded upon the relationship between guest and host. They referred to *Calve's Case*, 8 *Coke*, 32. 2 *Esp. Dig.* 254, (626,) 256, (628.) 3 *Bac. Ab. tit. Inns & Innkeepers*, 666. There is no averment in the declaration that *Hogg* continued at the inn, and was there abiding when the goods were lost. They referred to the forms of declarations in 1 *Harr. Ent.* 460. *Coke's Ent.* 347. *Yelv.* 162. *Cro. Jac.* 224. 2 *Chitty's Plead.* 273. *Rast. Ent.* 404, 405. 3 *Bac. Ab. tit. Inns & Innkeepers*, (C,) 666. On the second point they referred to *Calve's Case*, 8 *Coke*, 32. On the sixth point they contended, that the averment in the declaration, being that the servant was in possession of a sum of money, when the fact was that it was not money but bank notes, and there being no averment of the value of the notes, the declaration is fatal. They referred to 3 *Saund.* 380, (note 13.) 2 *Chitty's Plead.* 271, 274, 324. On the seventh point, they contended, that it should have been averred in the declaration that the plaintiffs were an incorporated body, and competent to sue, &c. and that the act incorporating them, being a private act, should have been produced at the trial.

Williams, for the appellees. 1. The declaration contains sufficient certainty of *Hogg's* being in the inn at the time of the loss of the money. The sojourning commenced on the 27th and continued to the 28th. But it is not necessary to aver the sojourning at the time of the loss, and none of the forms state the guest was abiding in the inn at the time of the loss. The relationship between the guest and host must continue, but it is not necessary to aver it in the declaration. He referred to 1 *Com. Dig.* 297, 298. *Calve's Case*, 8 *Coke*, 32. *Owings vs. Wyatt*, 3 *Harr. & M. Hen.* 393. 1 *Harr. Ent.* 460.

2. 3. It is averred in the declaration that *Hogg* was the servant of the plaintiffs. It is not necessarily to be inferred that the servant's expenses are to be paid by the master. The reason of the law is, that the innkeeper shall have a profit; and therefore it was of no consequence who paid the expenses.

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4. Whether the money was the property of *Hogg*, or of the plaintiffs, was a fact for the jury.

5. There was express proof that the defendant was to be answerable if the goods were lodged in the bar of the inn; so that if he was not liable within the custom, his liability came within his own rules.

6. The notes are sufficiently described even as chattels, no matter if they are worth nothing. It was for the jury to find the value. No other description of the notes could be given than has been done. He referred to *Calve's Case*, 8 *Coke*, 32. *Esp. Dig.* 256, (627.) Bank notes are as well known as money, and they are to be regarded as money. A tender in bank notes is good if it is not specially excepted to.

7. The act incorporating the plaintiffs is a public law, the state having reserved therein a right to become a stockholder. This objection, if a good one, comes too late after verdict. It should have been made in the court below by plea in abatement.

The opinion of the court was delivered by

BUCHANAN, J. The testimony, (substantially,) on which the appellees rested their case, as stated in the bill of exceptions, was that *John Hogg*, intending to go to *Baltimore* for the purpose of purchasing goods, and having two hundred and fifty dollars in notes of the *Havre-de-Grace Bank*, applied to the cashier of that institution for *Baltimore* paper in exchange, who gave him an equal amount in *Baltimore* paper, but left the notes of the *Havre-de-Grace Bank* in the hands of *Hogg*, and directed him to pass them away in *Baltimore*, for the benefit of the bank, or if that could not be effected, to return them, which he agreed to do; that there was no loan of the notes to *Hogg*, and that the arrangement was made entirely for the accommodation of the bank. That *Hogg* proceeded to *Baltimore*, taking with him the two hundred and fifty dollars in notes of the *Havre-de-Grace Bank*, and put up as a guest at the house of the appellant, who was a common innkeeper in the city of *Baltimore*. That on the evening of the 27th of September, 1816, *Hogg* (being then a guest at the house of the appellant,) intending to go out, gave his pocket book, containing the said two hundred and fifty dollars, to *Aaron Wright*, the bar-keeper of the inn, for safe keeping; that on

the following morning he asked *Wright* for his pocket book, who told him that it was locked up in the appellant's room, who had gone to market with the keys, and that under pretence of going to the market, in search of the appellant, in order to procure the key, *Wright* absconded, and never afterwards returned; that on the return of the appellant from market, *Hogg* asked him for the pocket book, and told him what *Wright* had said, who said that it was not in his room, and that what *Wright* had stated was false, and expressed his fears in relation to the pocket book. That *Hogg* had no intimacy with *Wright*, and did not intrust the pocket book with him on account of any personal confidence reposed in him, but exclusively on account of his situation in the inn; and that neither the pocket book, nor any of its contents, have ever been received or recovered back by *Hogg*, or the appellees. To which there was no opposing evidence. But it was proved, on the part of the appellant, that *Hogg* was in the city of *Baltimore* on his own business, and was alone answerable, and bound to the appellant for his expenses at the inn, and that he never considered the appellees as answerable for them. Whereupon the opinion of the court, and their direction to the jury, that the appellees were not entitled to recover, were prayed by the counsel for the appellant, and the court did right in refusing, upon that testimony, to give the opinion and direction prayed; for from the facts set out as furnishing the cause of action, if true, it is clear that the bank notes, which form the subject of the suit, belonged to the *President and Directors of the Havre-de-Grace Bank*, and that *John Hogg* was intrusted and empowered to dispose of them for the benefit of the bank, and was, *quo ad hoc*, the servant of that institution. Common innkeepers, without any particular contract or agreement for that purpose, are answerable for all losses in their inns, happening either by the acts or negligence of themselves, or their servants, to travellers and guests received by them; and if a servant is robbed of his master's money or goods, the master may maintain the action against the innkeeper, in whose house the loss was sustained. Here it appears that the appellant was a common innkeeper; that the pocket book, containing the bank notes belonging to the *Havre-de-Grace Bank*, was given for the safe keeping by *Hogg*, to the bar-keeper of the inn; that the pocket

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book and notes were lost, and never regained; and that *Hogg*, at the time they were so lost, was a guest at the inn, received there by the appellant. But it is said, that it does not appear that the appellees are a corporate body, and had a right or power in law to sue. To which it is answered, that the *Havre-de-Grace Bank* is chartered by an act of the legislature of the state, and that the charter or act of incorporation reserves, for the use and benefit of the state, five hundred shares of the capital stock, to be subscribed for in such manner as the legislature may direct, thus connecting the institution with the fiscal concerns of the state; and in the 22d section provides, that any director, officer, or other person, holding any share, &c. of the said bank stock, who shall commit any fraud or embezzlement, touching the money or property of the bank, shall be liable to prosecution, by indictment, in the name of the state. It is therefore deemed a public law, which requires not to be proved as a private act, but must be judicially taken notice of as all other public laws. There is nothing in the argument attempted to be drawn from the evidence, offered on the part of the appellants, that *Hogg* was, at the time of the robbing or loss, in the city of *Baltimore* on his own business, and was alone bound for his expenses at the inn. Innkeepers are answerable, by reason of the profit arising either from the keeping of the horses, &c. of their guests, or from the entertaining of the guests themselves, in the case of money or other property, from the keeping of which alone no profit can arise. So, that if a guest goes to an inn, and leaves his horse there with the host, and goes away himself for a time, and in his absence the horse is stolen, the host is chargeable, on account of the profit arising from the keeping of the horse; but if he goes away for several days, leaving money, or other dead property there, which is stolen or lost during his absence, the host is not answerable for the loss, as at that time he was deriving no profit or gain, either from the keeping of the money or goods, or from the entertaining of the guest himself. It is the profit then to the innkeeper which alone creates his liability, and it matters not out of whose funds the expenses of the guest are defrayed, it is enough that he receives the consideration from whence his responsibility arises, the premium for his risk.

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Thus it is said in a case in *Yelverton*, that "if A sends his money by his friend, who is robbed in the inn at which he is a guest, A shall have the action."—And there is no reason why it should not be so, the innkeeper being chargeable, not on the ground that he entertains the owner of the money, or other goods, but because he receives, no matter by whom paid, a compensation for the risk. The judgment in this case, therefore, ought to be affirmed, if there was no other objection than what grows out of the bill of exceptions. But after verdict, there was a motion in arrest of judgment, and the reasons assigned are, that the allegation in the declaration is of the loss of money in bank notes, and that bank notes are not money, and that the declaration is uncertain and insufficient in point of law; which are also insisted on here, as objections to the declaration. The former of these objections, that bank notes are not money, cannot be sustained; they answer all the purposes of money, in the ordinary concerns of the community; by common assent they are treated as money in the payment of debts, the purchase of goods and lands, and in the every day transactions between man and man, and at this hour can only be considered as such. They are a legal tender, unless specially objected to at the time, and will pass by will, under the general description of money—as "all my money in such a draw."

But the other objection is fatal. It is a general rule in pleading, that the declaration must show a title in the plaintiff—a legal cause of action. A title defectively set out, may be cured by verdict, but the gist, and every thing that is of the essence of the action, must be set forth; and that is of the essence of the action, without which, the court could have no sufficient ground to give judgment, though the fact alleged be found for the plaintiff, and may be moved in arrest of judgment.

An innkeeper is only answerable for money, or other dead property, lost in his inn, where the party losing it was a guest at the inn at the time of the loss, the profit arising from the entertaining of the guest, as before remarked, being the foundation of his liability.

In an action therefore against an innkeeper, for the loss of such property in his inn, it is necessary to be set out in the declaration, that the plaintiff was a guest at the inn at the time of the loss, that being the essence of the action,

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without which the court could have no sufficient ground to give judgment.

In this case it is alleged in the declaration, that *Hogg* was a guest at the inn of the appellant on the 27th of September 1816, and that afterwards, on the 28th of September, the money was stolen, without stating that he was a guest there at the time, or on the day that it was taken away, and thus showing no cause of action. For though a guest on the 27th, *non constat* that he was there on the 28th. For any thing appearing in the declaration he might have gone away. It is not the case of a title defectively stated, which might be good after verdict, but one, in which no title or cause of action is set out, or foundation laid for a judgment.

The declaration is therefore radically defective, and not cured by the verdict; and the motion in arrest of judgment ought to have prevailed.

JUDGMENT REVERSED.

JUNE.

CRAYCROFT vs. CRAYCROFT.

A, by his will, devised his lands to his three sons P, C and D, in joint-tenancy, in fee. B died in the lifetime of the testator—Held, that the devise did not lapse, but on the death of the testator, C and D took the whole interest by survivorship; and not being a lapsed devise, is not within the provisions of the act of 1810, ch. 34

APPEAL from a decree of *Prince-George's* county court, sitting as a court of equity. The appellants filed their bill against the appellees, claiming the entire interest in two parcels of land in *Prince-George's* county, of which *Bladen Craycroft*, the ancestor of both the appellants and the appellees, died seized, and asking of the court to make a partition of these lands between the appellants. The facts set forth in the bill, and which are admitted by the answers are, that *Bladen Craycroft*, who was the father of the appellants, and grandfather of the appellees, being seized of the lands in question, by his will, dated the 16th of December 1813, devised them to the appellants, and to his son *J. P. Craycroft*, the father of the appellees, and brother of the appellants, in joint tenancy. After the date of the will, and before the testator's death, *J. P. Craycroft*, the father of the appellees, died intestate, leaving the appellees his heirs at law. And the question was, whether they have any and what interest in the land so devised? The county court [*Johnson*, Ch. J. and *Key*, A. J.] in the reasons given for their decree, stated that by the fourth section of the act of 1810, ch. 34, it is express-

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ly enacted, that "no devise, legacy or bequest, shall lapse or fail of taking effect by reason of the death of any devisee or legatee, but every such devise, legacy or bequest, shall have the same effect and operation in law to transfer the right, estate and interest, in the property mentioned in such devise or bequest, as if such legatee had survived the testator," language more strong, can be hardly conceived, that would more effectually have secured the interest of the defendants, — decreed, that the complainants are each entitled to one equal third part of the land devised, and that the defendants, the heirs of the devisee, are entitled equally to the remaining third part; but inasmuch as it doth not appear to the court whether the interest of the parties will be advanced by a partition or sale, it is adjudged that T. T. S. &c. be appointed commissioners; &c. From this decree the complainants appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, EARLE, MARTIN, and DORSEY, J. by

R. Johnson, for the appellants, who referred to the act of 1810, *ch. 34, s. 4.* 2 *Fonbl.* 306; and 2 *Blk. Com.* 513.

No counsel appeared for the appellees.

The opinion of the court was delivered by

BUCHANAN, J. The will of *Bladen Craycroft*, under which the appellants claim, was made on the sixteenth day of December in the year 1813, and what interest they took on the death of the testator, in the lands devised, depends upon the construction to be given to the *fourth* section of the act of 1810, *ch. 34*, which is in these words, "no devise, legacy or bequest, shall lapse or fail of taking effect by reason of the death of any devisee or legatee named in any last will or testament, but any such devise, legacy or bequest, shall have the same effect and operation in law, to transfer the right, estate and interest, in the property mentioned in such devise or bequest, as if such devisee or legatee had survived the testator," and means no more than what is clearly expressed, and is only a provision for the case of a lapsed legacy or devise, which certainly is not this case. *Bladen Craycroft* devised the lands in controversy to his three sons, *John P. Craycroft*, and *Clement*

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and *George Craycroft*, the appellants, in joint tenancy in fee, and *John P. Craycroft* died in the life-time of the testator. In law, the devise was not thereby extinguished, it did not lapse; but on the death of the testator, the appellants took the whole interest by survivorship. It is not then within the provision of the act of assembly; not being in law a lapsed devise; and it would be straining overmuch to construe that to be a lapsed devise; which the law holds to be otherwise, for the purpose of bringing it within the act. The legislature only intended to make provision for a case, which before was not provided for by law, by giving life and effect to a devise or bequest which otherwise would be inoperative; and not to give to an operative devise or bequest an effect different from that which the law before gave, and thus to change the legal course of the property, and to give to it a new direction, by changing the character of the estate created by the will, as to turn an estate in joint tenancy into an estate in common; which would be the effect of so construing the act of assembly, as in the event of the death of one of two joint devisees or legatees in the life-time of the testator, to destroy the right of survivorship; and to give to the heirs or representatives of the deceased devisee or legatee, one half of the estate, as is contended for in this case. But that would be to strain the act rather too far, in order to apply it to a case not within the mischief intended to be remedied, not to preserve, and give life and effect to a devise or bequest, that would otherwise be extinguished, but to divest a subsisting and operative devise or bequest of its legal character and effect, which was not the object of the law. It was only intended to prevent the extinguishment of a devise or bequest, by reason of the death of the devisee or legatee in the life-time of the testator, when, in the event of such death, the devise or bequest would, without the aid of the legislature, have lapsed, or failed to take effect, and the deceased have died intestate in relation to the property therein mentioned, and to give to such devise or bequest the legal effect and operation to pass the property, in the same manner as if the devisee or legatee had survived the testator, in order merely to prevent the intestacy of the deceased. Therefore, where the devise or bequest would not have lapsed or failed to take effect by reason of the death of a devisee or legatee in the life-time of the testa-

for, as in this case, it is not within the mischief intended, or required to be remedied, and the act of assembly does not apply, but such devise or bequest is left to its own operation in law. But suppose that in this case, without the aid of the act of assembly, the devise would have lapsed or failed to take effect, in consequence of the death of *John P. Craycroft* in the life-time of the testator, what would be the effect of the act? Why, not to alter the nature of the estate, and turn it into a tenancy in common, as between the appellants and the heirs at law of *John P. Craycroft*, but to resuscitate the devise, and give to it the effect and operation to pass the estate in the same manner as if he had survived the testator; and if he had survived the testator, but died afterwards, leaving the appellants his survivors, they would have taken the whole by survivorship; therefore, the operation of the act being to pass the estate, as if he had survived the testator, the right of survivorship would not be taken away from the appellants, but the property would pass to them just as if he had died after the death of the testator. In any view, then, that we are able to take of the subject, the entire interest in the estate, devised by *Bladen Craycroft* to *John P. Craycroft* and the appellants, survived to the appellants, to the exclusion of the heirs at law of *John P. Craycroft*.

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DECREE REVERSED.

And decreed, that the county court of *Prince-George's* county proceed on the bill of complaint in the proceedings mentioned, and cause partition of the lands, in the bill mentioned, to be made between *C. & G. Craycroft*, the appellants, according to the prayer of their bill.

THE BALTIMORE and HAVRE DE GRACE TURNPIKE COMPANY vs. BARNES.

JUNE.

APPEAL from *Harford* county court. The appellants brought an action of *assumpsit* against the appellee, on the 25th of January 1819. The defendant below pleaded, 1. *Non*

ments; four of the instalments had become due more than three years before the suit was brought against the defendant, who was a subscriber, and who pleaded the statute of limitations. The last instalment of \$20 was not barred. Held, that although the last instalment of \$20 was not barred by the statute of limitations, yet as the county court had not jurisdiction of that sum, that court did not err in their direction to the jury, that the plaintiffs were barred of their right of action by the defendant's plea of the act of limitations.

Under an act of the legislature incorporating a company, shares were to be subscribed for to be paid in five instal-

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assumpsit. 2. Non assumpsit infra tres annos; and 3. Actio non accrevit infra tres annos. General replications and issues joined. At the trial the plaintiffs offered in evidence an act of the general assembly passed at December session 1813, *ch. 167*, entitled, "An act to incorporate a company to make a turnpike road from the city of *Baltimore* to *Havre de-Grace*," which, amongst other things, authorised a subscription for 800 shares of stock at \$25 per share, to be paid for by instalments of \$5, on two months notice. They also offered in evidence a certain paper writing, purporting to be a subscription list of stock, taken and subscribed for on the 7th of March 1814, pursuant to the said act of assembly for making the said turnpike road, at *Bush town*, in *Harford* county, by the commissioners appointed for that purpose. And proved that the signature to the said paper writing, "*Hosier Barnes*," and the words "*four shares*," written thereto, were in the proper hand writing of the defendant. They further offered in evidence, that the several requisitions of the instalments of capital stock of the said company, set forth and stated in the declaration, viz. on the 26th of September 1814, 1st of June 1815, 4th September 1815, 20th December 1815, and on the 10th of March 1816, were made in the manner and form prescribed by the said act of incorporation; and that the president and managers of the said company gave two months public notice of the payment so required. The plaintiffs then prayed the opinion and direction of the court to the jury, that if the jury should believe that the time appointed for the payment of the last instalment on the said stock, so subscribed for, and required to be paid, as is set forth in the declaration, was within three years next before the impetration of the original writ of the plaintiffs, that they are not barred by the defendant's pleas of the statute of limitations, or by any of them, in their right of action, as to any portion of their said claim, but are entitled to recover for the whole subscription then due. The court, [*Hanson and Ward A. J.*] refused to give this direction to the jury; but were of opinion, and so directed the jury, that under the evidence before them the plaintiffs were barred in their right of action by the defendant's second and third pleas to the declaration. The plaintiffs excepted; and the verdict and judgment being for the defendant, they appealed to this court.

The cause was argued before BUCHANAN, MARTIN, and STEPHEN, J.

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Winder, for the appellants. This is an action of *assumpsit* to enforce the payment of money subscribed to the company, under the *fifth* section of the act of 1813, *ch.* 167. The defendant subscribed for four shares at \$25 per share, to be called for in four instalments at \$5 each. The last call was made on the 10th of January, 1816, payable the 10th March, 1816, and the writ issued on the 25th of January, 1819, within three years before the time for payment of the last instalment, but not within three years as to the other instalments; and the act of limitations has been pleaded. The only question is, whether the plea of limitations applies to the case? By the 8th sect. of the act of 1813, *ch.* 167, the act of 1812, *ch.* 78, is referred to as giving the right to enforce payment, if the party subscribing refuses to pay. The defendant became answerable to pay the whole on failing to pay each instalment at the time of the last call, otherwise there would be a multiplicity of suits. The right of action only accrued on the last instalment. The plea must be true in toto, or not at all. In point of fact the defendant has not made out his pleas, because the limitation cannot bar the whole, as the last call is not barred. Here he has pleaded general pleas of *non assumpsit infra tres annos*, and *actio non accrevit infra tres annos*. The opinion of the court is erroneous, because they say the plaintiffs are not entitled to recover any thing.

Magruder and *R. Johnson*, for the appellee. Suppose three notes sued upon, and limitations pleaded, was is ever heard that if two of the notes are barred, and one not, that the plaintiff would not be barred of his action as to the two notes? So in an action on open account, where some of the articles are more than three years standing, and limitations are pleaded—it will bar all the articles charged more than three years. Suppose a note for different instalments, on one becoming due the holder might sue for it, and the right of action then accrued. Here the right to sue arose at the time each instalment became due. An engagement to pay by instalments, entitles the party to sue, on each being due, in *assumpsit*, but not in debt. *Rudder vs. Price*, 1 H. Blk. 547. *Cooke vs. Whorwood*,

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3 *Saund.* 337. *Gray vs. Pindar*, 2 *Bos. & Pull.* 427. *Chitty on Bills*, 414, and *note*. The plaintiffs, therefore, could have sued for each instalment as they respectively became due. The only doubt is, whether on the first instalment becoming due the plaintiffs might sue for the whole? Four of the instalments were of more than three years standing when the action was brought. Where a party agrees to pay a sum of money in portions, as it may be called for, when called for, the right of action accrues. Whether the opinion of the court below is wrong in part, is of no consequence, because if a verdict had been given for the \$5 on each share of the last instalment, they could not sustain the action, the amount not being within the jurisdiction of the court. If the case is reversed, will it be sent back when it is seen the plaintiffs cannot succeed? The spirit of the act of 1790, *ch.* 42, does not embrace a case like this.

The opinion of the court was delivered by

MARTIN, J. This was an action brought to recover the price of four shares in *The Baltimore & Havre-de-Grace Turnpike Company*, amounting to \$100; this sum was to be paid in five instalments of \$20 each, four of those instalments were due before the 1st of January, 1816, the last on the 10th of March in the same year. The defendant relied on the statute of limitations, and the court instructed the jury, that from the evidence, the plaintiffs were barred of their right of action, by the pleas of the defendant.

The plaintiffs had a right to demand from the defendant, the amount of each instalment when it became due, and limitation attached at that time; they were then barred by the pleas of the defendant, as to the four first instalments, because more than three years had elapsed from the time they were demandable to the institution of the suit. The last instalment of \$20 became due on the 10th of March, 1816, and the suit was commenced on the 25th of January, 1819, this being within three years before the suit, limitation did not bar it. Had the plaintiffs then a legal right of action to maintain this suit for the sum of \$20? If they had a right of action, they were entitled to the judgment of the court, and to the fruits of that judgment.

By the act of 1809, *ch.* 74, it is declared, "that in all

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"cases where the real debt or damages shall not exceed the sum of \$50, it shall and may be lawful for one justice of the peace, to try, hear, and determine, the matter in controversy between the parties;" and by the 6th section of the same law, "that the judges of the several county courts within this state, shall not hold plea in the said courts of any debt or damage, in cases within the jurisdiction given to justices of the peace by this act, which shall not exceed \$50." The court then having no jurisdiction, unless the sum recovered amounted to above \$50, a judgment could not have been rendered on a verdict for \$20, and the plaintiffs would have been nonsuited.

It was contended, that although a judgment could not have been rendered on a verdict for \$20, the court were wrong in directing the jury to find for the defendant, and for this error the judgment ought to be reversed, and the case sent back for a second trial.

By the act of 1790, *ch. 42*, the court are directed, where the judgment, on a bill of exceptions taken by the plaintiff, is reversed, to send the case back with a *procedendo*. This is evidently intended for the benefit of the plaintiff. But why reverse a judgment, and direct a *procedendo* in a case, where the plaintiffs, by their own showing, never can be benefitted? where they never can obtain the judgment of the court, but must suffer a nonsuit. Such a course of proceedings would be idle and nugatory, and cannot be sanctioned by this court,

JUDGMENT AFFIRMED.

DORSEY vs. SMITHSON.

JUNE.

APPEAL from *Harford* county court. An action of *replevin* was brought by the appellee against the appellant, and the following case was stated for the opinion of the court. The property replevied was part of the property contained in a bill of sale from *E. Smithson* to the plaintiff, (now appellee,) dated the 12th day of March 1817, executed by her, she being then the owner of said property, and acknowledged on the same day before a justice of

assembly of 1729, *ch. 8, s. 6*.

The executor of the donor has no right to the goods and chattels mentioned in the bill of sale. He is stopped to allege that the deed is in fraud of creditors; and the property is not assets in his hands, and as executor he is not accountable for it.

If the bill of sale is fraudulent to creditors, the donee is chargeable to them, to the full extent of the property transferred, as executor *de son tort* of the donor.

There may be a rightful executor, and an executor *de son tort* of the same person, and at the same time.

A bill of sale of personal property executed and acknowledged, but not recorded, is void as to creditors, if made to their injury; but is binding on the donor, her executor, administrators and assigns, and all claiming under her or them, both at common law, and under the act of as-

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the peace, but not recorded as the act of assembly directs; it was made for the consideration of love and affection to the plaintiff, he being her nephew, and not with an intention of defrauding her creditors. All the property remained in the hands of the vendor, from the date of the bill of sale till her decease, except a negro man named *Jim*, who was delivered by her to the plaintiff at the time the bill of sale was executed in the name of the whole, and remained in the plaintiff's possession from that time. *Thomas Ayres* obtained a judgment against *E. Smithson*, at August term of *Harford* county court 1817, for the sum of \$1782; which action was on the trial docket at the preceding March term, the month and year when the bill of sale was executed, and which action was called up for trial on the day before or after the date of the bill of sale, and then continued. The said judgment was rendered against *E. Smithson*, as the executrix of her former husband, upon whose estate she had taken out letters testamentary, and she gave bond, with the plaintiff and defendant in this cause as her sureties, for the payment of all debts and legacies due from the estate of her husband. The defendant in this cause paid \$400 of the judgment of *Ayres* for *E. Smithson*, on the 20th of March 1818, and is now a creditor of her estate to that amount, she having died on the 20th of June 1818. By her last will and testament, dated on the 19th of June 1818, amongst other things, she bequeathed as follows, viz. "I give and bequeath unto my niece, *Elizabeth Dorsey*, all and singular the personal estate or property of every kind and description which I shall be possessed or own at my death, excepting all the right I now or then may have in negro slaves, to her the said *Elizabeth Dorsey*, her heirs and assigns, for ever," &c. and appointed the defendant her executor. *Elizabeth Dorsey*, the devisee and legatee in said will, is the wife of the defendant, the executor. The defendant took out letters testamentary on the 30th of July 1818, and took possession of the property replevied in this suit, and has assets in hand sufficient to pay the debts due from her estate, exclusive of the property contained in the bill of sale. There was no agreement between *E. Smithson*, and the plaintiff, that the bill of sale should be inoperative at any time after it was executed, or that she should hold the property in her own right. The county

court gave judgment *pro forma* for the plaintiff, and the defendant appealed to this court.

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The cause was argued before BUCHANAN, EARLE, MARTIN, DORSEY, and STEPHEN, J.

R. Johnson, for the appellant, contended, that the judgment ought to be reversed—1. Because notwithstanding there were assets sufficient to pay the debts of *E. Smithson*, yet at the time the suit was brought, the appellant, as her executor, had a right to the possession of the property in controversy, until he ascertained whether there was a sufficiency of assets. 2. Because he was a creditor, and as against him the bill of sale was absolutely void, and he had a right as creditor to look to this property as the means of satisfying his debt, though there was other property sufficient. He referred to the act of 1729, *ch. 8, s. 5*, and *Smith vs. Williamson*, 1 *Harr. & Johns.* 147.

Murray, for the appellee, cited 3 *Bac. Ab. tit. Fraud*, (C) 314, and the act of 1729, *ch. 8, s. 6*.

The opinion of the court was delivered by

EARLE, J. The bill of sale, which gave rise to the dispute between the parties in this cause, was executed and acknowledged before a justice of the peace, but was not recorded as the act of assembly directs.

It is void as to creditors, if made to their injury, but it is binding on the donor, her executors, administrators and assigns, and all claiming under her or them, both at common law, and under the act of assembly of 1729, *ch. 8, s. 6*. Being an obligatory instrument on the donor, and those claiming under her, the appellant, as her executor, has no right to the goods and chattels mentioned therein, nor is there any legal excuse for his possessing himself of them even for a time. He is estopped to allege that the deed is in fraud of the creditors, and there being no other ground on which he can contend for the property with the donee, *William Smithson*, the same is not assets in his hands, and he, as executor, is not accountable for it. The responsibility of an executor must depend on the means the law places in his power, to possess himself of the property he is to hold *in auter droit*, and where he is not armed with authority to take possession of any specified chattel, he is not answerable for it. The goods and chattels in dispute

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not being assets belonging to the personal estate of *Eleanor Smithson*, it necessarily follows, that the appellant, as her executor, is without a legal excuse for attempting to possess himself of them, even for a limited time. He could only do so for the purpose of administration, and they were clearly not objects to be administered on by him. If the bill of sale under consideration is fraudulent to creditors, *William Smithson*, the appellee, is chargeable to them, to the full extent of the articles transferred, as executor *de son tort* of *Eleanor Smithson*. Any or all of her creditors may sue him, as executor, in his own wrong, and secure their debts by executions on the property. And no reason appears to the court, why the appellant himself, if he is a prejudiced creditor, may not sue in this character, and recover his debt of *Smithson*, the appellee. His being the rightful executor will not obstruct his action, for there are many instances, and if fraud exists in this, it is one of them, where there may be a rightful executor, and an executor *de son tort*, of the same person, at the same time. See 3 *Bac. Ab. tit. Executors & Administrators*, (B) 22. The appellant also claims the right to possess himself of the property mentioned in the bill of sale, because he is a creditor of his testatrix, the deceased *Mrs. Smithson*. This is not allowable to him more than to any other creditor. It is not for a creditor to carve for himself and seize on his debtor's property wherever it is to be found, but he must resort for redress, when his right is withheld from him, to his action at law. Neither can the appellant defend his possession of the disputed property as a creditor, against this replevin, on the score of fraud in the donor. But if it were conceded to him to be a legal defence, yet it would not avail in this cause. For it is distinctly admitted, in the case stated, that the donor executed the bill of sale upon a lawful consideration, and without an intention to defraud her creditors, and that at her death, she left estate sufficient to pay all her debts, exclusive of the property transferred by that instrument.

In every view we have taken of the decision of the court below, we approve of it, and therefore we affirm their judgment.

JUDGMENT AFFIRMED.

CARNAN *et al.* vs. TURNER.

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vs
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APPEAL from a decree of the court of chancery. The cause was argued before BUCHANAN, EARLE, and DORSEY, J. by *Cosden*, for the Appellants, and by *Magruder*, for the Appellee.

The opinion of the court (in which the facts are sufficiently stated) was delivered by

EARLE, J. The object of the bill filed in this case is, to sell a certain portion of the real estate of Doctor *Sluyter Bouchell*, deceased, to pay a debt alleged to have been due from him at the time of his death, to the complainant, (the appellee,) upon the principle, that his personal estate is insufficient to pay his debts. The bill is against *John Bouchell* and *Peter Bouchell*, to whom the testator devised his tract of land in *Cæcil* county called *Providence*, against *Edward Foard*, to whom it is alleged they conveyed the said tract without consideration, and against *John Carnan* the surviving executor of Doctor *Sluyter Bouchell*. The sum due from the estate of the deceased to the complainant, is stated to be £1626 16 5, which was ascertained by a decree of this court at June term 1810, in a suit of the complainant against *John Carnan* and *Sluyter Bouchell* executors of Doctor *S. Bouchell*. That decree, with all the proceedings connected therewith, is made an exhibit in the said bill, and on it the complainant wholly relies for evidence of his debt due from Doctor *S. Bouchell's* estate. One of the defendants, *John Bouchell*, became lunatic, and answering the said bill by his guardian, *George Palmer*, professed entire ignorance of the complainant's demands, and put him on the establishment of them by proof. The bill was taken *pro confesso* against the other defendants, and the late chancellor decreed a sale of the said tract called *Providence*, appointing a trustee to make the said sale.

From this decree of the chancellor the defendants appealed, and it has become the duty of this court to review it and express an opinion on the points it presents.

We have with great care examined the record, and particularly that part of it which contains the decree of this court, and the proceedings connected with the decree, as it is exhibited by the complainant, and made the foundation of his claim of right, to sell a part of the real estate

A obtained a decree against the executors of B for a sum of money. He afterwards filed a bill against the devisees and executors of B, in order to have a sale of the real estate of B to pay the said debt, upon the principle that the personal estate was insufficient; and he wholly relies for evidence of his debt on the decree. *Held*, that it appearing by the account upon which that decree was founded, which was for rents received by B and his executors of the estate of A, that at the time of the death of B, he was a creditor of the estate of A, and that the sum of money decreed against the executors of B, had been received by them for rents, the real estate in the possession of the devisees of B is in no way responsible for it.

In the event of the exhaustion of the personal assets of a deceased in the payment of debts, the real estate is answerable to the creditors for the deficiency; but the claimants must prove themselves creditors of the deceased ancestor.

How far a judgment or decree against executors may be used in evidence against the devisees of the testator? *Quere.*

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of Doctor *Shuyter Bouchell*, deceased. Upon inspecting it narrowly, we find, that at June term 1810, this court decreed £1626 16 5 to be paid by the executors of Doctor *Shuyter Bouchell*, to the complainant, *John Turner*, and state that the said sum had been ascertained agreeably to the account to the decree annexed. This is an account between Doctor *S. Bouchell* and the estate of *John Vansant*, the father of *Rachel Turner*, the wife of the complainant, and consists chiefly of items of charge against Doctor *Shuyter Bouchell*, for rents received on certain leasehold estates, the full and peaceable possession of which was then decreed to be delivered up by the executors to the complainant. The account of receipts commences with the first day of July 1775, and is carried regularly down, including the rents of every year, until the first of January 1810, with the exception of the interval of time between the 4th of July 1776 and the 1st of January 1781. It is admitted in the proceedings that Doctor *S. Bouchell* died early in the year 1797, at which period the bill of revivor was filed against his executor, and on the first day of that year the account makes him a creditor of *John Vansant's* estate, to the amount of £208 1 3½. After his death his executors went on to receive the rents accruing on the leasehold estates, then in litigation; and between 1797 and 1810, actually got into their hands rents, with interest charged them, to the amount of £1934 17 8½, from which deduct the £208 1 3½ due to Doctor *S. Bouchell* at his death, and it leaves £1626 16 5, the sum decreed to be paid by the executors as aforesaid.

The account thus examined, is an exposition of the true meaning of the decree of this court, and with the court's understanding of it, we cannot permit ourselves to doubt of the impropriety of the chancellor's decree. It is bot-tomed on the conviction, that there was a large debt due from the late Doctor *S. Bouchell* at his death, to the complainant, and that there was a deficiency of personal assets to pay it, whereas in truth, according to the complainant's own showing, there was no such debt. The complainant has a just claim against the executors of Doctor *S. Bouchell*, grounded on their receipts of rents of certain leasehold estates, a long time a subject of litigation between them in the court of chancery, and in this court, but the real estate in the possession of the devisees of Doctor *S.*

Bouchell is in no way responsible for it. In the event of the exhaustion of the personal assets, in the payment of debts, the real estate is answerable to the creditors for the deficiency, but the claimants must prove themselves creditors of the deceased ancestor. The sum due from these executors, became a debt long after the decease of Doctor *S. Bouchell*, and evidently arose from a tedious and protracted law suit, to which the devisees were not parties, and in which they had no participation, and for the consequences of which we have no hesitancy in saying they are in no manner liable.

A view too of the account settled by *John Carnan*, surviving executor of Doctor *S. Bouchell*, in the spring 1810, insisted on by the complainant as evidence in this cause, has convinced us, that the personal assets of the deceased, if the rents received by the executors after 1797 are to be so considered, were not insufficient to pay his debts. The executor has accounted for a very small part only of those rents, and if the residue of the £1874 17 8½, had been by him brought into the settlement, a large balance would have been found against him, quite adequate, as we conceive, to the payment of the demand of the complainant.

Without inquiry into the question, how far a judgment or decree obtained against executors can be used in evidence against the heir or devisee of the deceased, we are clear in pronouncing the decree of the chancellor in this case erroneous, and that it ought to be reversed.

DECREE REVERSED.

SCOTT vs. BURCH's Adm'x.

JUNE.

APPEAL from a judgment rendered in *Montgomery* county court, for the plaintiff in that court, (the now appellee,)

testate under an order made by the orphans court, (counter security having been required and not given) such surety acquires a right to the goods for the purpose of paying the debts of the intestate, and for distribution; and he hath both the possession and right of property: and the order operates as a divestment or extinguishment of the right derived by the administrator—Nor does the right of possession and property supervene to the administrator on the death of the surety.

The orphans court has no jurisdiction or power to decree the goods, in any event or on any terms, to be delivered over by the surety to the administrator, *qua* administrator.

If the administrator hath suffered by the misconduct of the surety in diminishing any part of the property, his remedy is by a special action on the case to recover damages.

In trover for negro slaves, a bill of sale executed by the plaintiff to a third person for some of the negroes, may be given in evidence by the defendant.

If a sale of property is *bona fide* made under an order of the orphans court, on credit, &c. and the purchaser complied with or offered to comply with the terms of sale, or paid the purchase money, then the property vested in the purchaser without actual delivery.

But his omission of any one of the above circumstances, cannot constitute a ground to presume that the sale was not a real one, but was collusive.

An administrator cannot at either a public or private sale purchase in the goods of his intestate for his own benefit.

The proceedings of the orphans court of the account and distribution of the estate of the intestate by the administrator are competent and sufficient evidence against the administrator.

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Where a surety in an administration bond obtains possession of the goods of the in-

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in an action of *trover* for sundry negro slaves. The defendant (now appellant,) pleaded the general issue.

1. The plaintiff, at the trial below, offered in evidence the letters of administration granted to her upon the estate of her deceased husband *Jesse Burch*, by the orphans court of *Washington* county, in the District of *Columbia*, on the 14th of June, 1803. She also proved, by competent witnesses, that the negro woman *Rachel*, named in the declaration, belonged to her intestate at the time of his death, and that the said negro woman, and the other negroes named in the declaration, and who were the children of said *Rachel*, after the death of her intestate, and after she obtained the letters of administration aforesaid, came to her possession as administratrix. That she resided in the city of *Washington*, in the District of *Columbia*, at the time of obtaining the letters of administration, and has ever since resided there. That the negroes before mentioned were, in the month of October 1818, sold by the defendant at public auction, and all of them sold for the following prices: *Sydney* for \$540, *Louisa* for \$525, *Eliza* for \$755, and *Rachel* and her two children for \$1030. That at the sale a son of the plaintiff's, and one of the distributees of her intestate, attended as her agent, gave notice to the defendant of her claim to the property, and objected to the sale; but that the defendant, notwithstanding the notice and objection, proceeded to make sale, and did make sale of the said negroes as before stated. That the said negro *Rachel*, and her elder children, were held by *Kinsey Gittings* in *Montgomery* county, whereof he was a citizen ever since the year 1805, and her other children were born in his possession, and so continued at the time of his death, which happened in September 1818. The defendant then offered in evidence a record of the orphans court of the county of *Washington*, in the District of *Columbia*, in which it is stated, that on the 14th of June 1803, letters of administration on the estate of *Jesse Burch*, deceased, were granted to *Jane Burch*, who entered into bond as administratrix, with *Benjamin Bacon*, *James R. Dermott* and *Kinsey Gittings*, as her sureties, and which bond was approved by the court. Then follows an inventory of the estate of the deceased, returned by the administratrix, amounting to \$716 98. That on the 21st of February 1804, *B. Bacon*, one of the above sureties, petitioned the court to order the

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administratrix to give counter security; and on her being summoned and having appeared, she was ordered to give counter security. She afterwards produced the bond of *Kinsey Gittings* to *B. Bacon*, dated the 18th of April 1804, conditioned to indemnify him for having become her surety. That on the 27th of April 1815, *Kinsey Gittings* complained to the court that he was under apprehension of suffering by his suretyship on account of the misconduct of the administratrix, and prayed that she might be ordered to give him counter security, or that the property of the deceased might be delivered to him. A summons was ordered against the administratrix, returnable on Saturday week. On Saturday the 11th of May 1805, the court passed the following order: "On application of *Kinsey Gittings*, one of the securities of *Jane Burch*, administratrix of *Jesse Burch*, stating to the court, and satisfactorily proving, that he is in danger of suffering from said securityships—Ordered, that all the property of the said *Jesse Burch* be delivered into the hands of the said *Kinsey Gittings*, unless the said *Jane Burch* give counter security to him on or before the 25th instant, and that citation issue to compel her thereto." On Saturday the 25th of May 1805, *Jane Burch* not appearing, and the summons being returned *non est*, it was ordered to be renewed, returnable on the second Tuesday in June then next, on which day it was ordered by the court that the order of the 11th of May be made absolute, and that she deliver up all the personal property of the deceased to *Kinsey Gittings*. On the 27th of July 1805, *Gittings* returned on oath an inventory of the estate of the deceased in his hands, viz. a negro girl named *Louisa*, daughter of *Rachel*, a negro girl named *Eliza*, daughter of *Rachel*, and prayed an order to sell them. And the court ordered that he should sell them at public auction, on a credit of six months, on giving three weeks notice in the *Washington Federalist*, &c. and taking bond with approved security for payment, with interest. That on the 17th of October 1807, the administratrix, on citation at the suit of *Thomas Burch*, having passed her first account, whereby it appeared that there was in her hands a balance of \$602 13, exclusive of an outstanding debt of \$120, still due by the deceased, which being deducted, left the sum of \$482 13, in her hands, to be distributed, it was ordered that the same be distributed as follows, viz. one third, \$160 71,

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to be retained by herself as widow, and the remaining two thirds, \$321 42, to be divided equally among the five children of the deceased, amounting to \$64 28½ each. The defendant then offered to read in evidence a bill of sale from the plaintiff to *Jesse Moran*, for sundry negro slaves, dated the 15th of May 1805, and duly acknowledged and recorded in the county of *Washington* aforesaid, and offered to prove the due execution and enrolment of the said bill of sale; and offered to prove that the negroes, *Rachel* and *Louisa*, in the said bill of sale mentioned, are two of the identical negroes mentioned in the declaration. The plaintiff objected to the admissibility of the bill of sale, and in order to show the same to be inadmissible and incompetent, produced to the court a record of the proceedings in said orphans court. [See the proceedings stated in *Gittings vs. Burch's adm'r.* 9 *Cranch*, 372.] The decree of the orphans court mentioned in the said record of proceeding, and above referred to, was made on the 19th of June 1813, whereby it was "adjudged, ordered and decreed, that the said *Kinsey Gittings* deliver to the petitioner, as administratrix of *Jesse Burch*, the negroes mentioned in the inventory of the defendant, and returned to this court on the 27th of July 1805, and the increase thereof, provided the said *Jane Burch* pay and satisfy the said *Kinsey* the sum of £46 7 0½, paid by him to *William Willson*, executor of *John Clarke*, being the amount of a judgment against *Jesse Burch*, and moreover repay the said *Gittings* \$64 28, being so much paid, as it appears, by *Gittings* to *Thomas Burch*, one of the children of *Jesse Burch*, for the amount of his dividend." This decree, as stated in the said record, having been reversed in the supreme court of the *United States*, and the cause remanded to the orphans court, and the administratrix having afterwards, on the 25th June 1816, filed her replication, denying all the matters and things in the answer, the orphans court passed an order for taking testimony, and a number of depositions were taken and returned to the court. That the defendant, although summoned, did not appear. After which, the proceedings state, that on "the 29th of November 1817, this cause standing ready for hearing on the bill, answer and replication, and on the depositions taken, and on all the proceedings had therein, the parties having appeared and being heard, it is, after due consideration by

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the orphans court of *Washington* county, and by the authority of the same, adjudged, ordered and decreed, this 29th of November 1817, that the decree formerly passed by this court on the 19th of June, 1813, be and the same is hereby affirmed, and now decreed." The plaintiff further offered evidence to prove, that before the institution of this suit, the negroes in the declaration mentioned were demanded of the defendant, and also, that at the time of making the said demand, she tendered to the defendant, as administrator of *Kinsey Gittings*, the sum of money directed by the decree of the orphans court of *Washington* county aforesaid, to be paid by her to the said *Gittings*, and that the defendant refused to receive the same. The plaintiff also read in evidence the return of sales of the defendant, made by him as administrator of *Kinsey Gittings*, to the orphans court of *Montgomery* county, viz. One negro girl named *Sydrey* \$540, ditto *Louisa* \$525, ditto *Eliza* \$755, one negro woman named *Rachel*, and her two children, \$1050. These sales were made on the 29th, 30th, and 31st of October 1818. The defendant, it was admitted, was the administrator of *Kinsey Gittings* named in said record, and held possession of the negroes in the declaration named, and sold the same as part of the estate of said *Gittings*; and it was also admitted, that the negroes, in the declaration mentioned, had been returned by the defendant in the inventory of said *K. Gittings's* estate, filed in the orphans court of *Montgomery* county, and that the said sale was made under the orders of that court made for that purpose, on the 14th and 27th of October 1818. The defendant objected to the admission of the said record, and the effect of the said record and parol evidence, especially at this stage of the trial, objecting as well to the substance and effect of the said record and parol evidence, as to the admission of it before the court, for the purpose of determining the preliminary question of the admissibility of the evidence now offered by the defendant; and the court, [*Ridgely* and *Kilgour A. J.*] sustained the plaintiff's objection to the admission and competency of the evidence so offered by the defendant, and refused to permit the said bill of sale to be given in evidence, it being the opinion of the court, that from the record and proceedings had between the plaintiff and *Kinsey Gittings*, deceased, in the orphans court of

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the District of *Columbia*, and which the court admitted should be read in evidence on behalf of the defendant, the same being produced and offered by him, and is before referred to: That the defendant, as administrator of *Kinsey Gittings*, acquired possession of, and claimed title to the negroes in the declaration named, as belonging to the estate of *Jesse Burch*, deceased; and that the defendant, thus claiming title under *Kinsey Gittings*, deceased, is concluded from giving the said bill of sale in evidence, to show an outstanding title in a third person, for the purpose of defeating this action: The defendant excepted.

2. The defendant then prayed the opinion, and instruction of the court to the jury, that upon the evidences so offered and produced, as well on the part of the plaintiff as of the defendant, if believed to be true by the jury, the plaintiff is not entitled to recover for the conversion of the several negroes in the declaration mentioned. Which instruction the court refused to give; and upon the prayer of the plaintiff, instructed the jury as follows: That although *Kinsey Gittings*, the defendant's intestate, may have been authorised by the order of the orphans court of the county of *Washington*, in the District of *Columbia*, dated the 11th day of June, 1805, to take possession of the property of the plaintiff's intestate, then still to be administered, and retain the possession thereof till his death, yet upon his death the defendant was not authorised to take the possession thereof, but was bound, when demanded by the plaintiff, as the administratrix of *Jesse Burch*, to deliver up the property to the plaintiff, (the letters of administration granted to her not having been revoked,) she being the only person who, after the death of *Kinsey Gittings*, could claim to hold possession of the said property, and being required by law to go on and discharge her trust; and the sale made of the said property by the defendant, as stated in the testimony, was conversion of it, for which this action may be maintained. To which several decisions of the court, admitting the said exemplification in evidence, refusing the instruction prayed by the defendant, and giving that prayed by the plaintiff, the defendant excepted.

3. The defendant then, for the purpose of proving that a sale had been made by *Gittings* of the negro woman *Rachel*, and her two twin children, pursuant to the orders

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and authority of the orphans court of *Washington* county, proved by a competent witness, that he was present in August, 1805, at *Barney's* (now *Semme's*,) Tavern, in *George-Town*, District of *Columbia*, at a public auction then and there had by an auctioneer, under the direction and authority of said *Gittings*, who was present acting as vendor of a negro woman and her two children, who were understood, and stated at the time, to be a part of the estate of *Jesse Burch*, deceased, and that the said negro woman, and her two children, were bought at such auction by Doctor *Osiat Offutt*; that the witness saw no money paid, nor any writing given to the auctioneer by *Offutt*, nor does he know that the said negroes, or any of them, were delivered to *Offutt*. The defendant further proved by another witness, that Dr. *Offutt*, (who has been dead about thirteen years,) told the witness early in the morning after the said sale, at the house of said *Offutt's* mother, where he lived, that he had bought a negro woman and her two children the day before, that he had enough on his place, (which was about two miles from his mothers,) and would sell those he had bought at the same price he gave for them, and offered to sell them to the witness at the same price, which was, according to the best of the witness's recollection, less than \$300; that the witness declined purchasing them, upon which *Offutt* said he would offer them to *Kinsey Gittings* in preference, and if he would not buy them he must sell them to some one else. The said witness further stated, that the negroes were not present at the time, and he saw them not in Dr. *Offutt's* possession at any time. The defendant then read in evidence *Gittings's* advertisement of said sale, published in the newspaper printed at *George-Town*, called *The Washington Federalist*, more than three weeks before the sale. Whereupon the court, upon the motion of the plaintiff's counsel, instructed the jury as follow: 1st. If they should be of opinion, from the evidence, that the sale was *bona fide* at public auction, and conformable to the order of the orphans court, and an entry of said sale was made by the auctioneer, and that Doctor *Offutt* complied with, or offered to comply with, the terms of sale, or paid the purchase money to *Gittings* for the said negroes, that then the property became vested in him, without an actual delivery.

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thereof to him being necessary. 2d. If they should be of opinion, from the evidence, that the terms of sale were not complied with, or offered to be complied with, by Doctor *Offutt*, or the purchase money was not paid by him to *Gittings*, or that there was no delivery of the negroes to the said *Offutt*, that the Jury may and ought to presume that the property in the negroes was not divested, but still remained in *Gittings's* hands, as part of the property belonging to the estate of *Jesse Burch*. 3d. If the jury should be of opinion, from the evidence, that Doctor *Offutt* did purchase the said negroes for *Gittings*, then such sale is void; but if the jury should be of opinion that Doctor *Offutt* did purchase the negroes for himself, and did comply with the terms of sale, or had possession of said negroes delivered him, and afterwards agreed that *Gittings* should have them at his own bid, then the said sale is legal, and the plaintiff is not entitled to recover in this action. To the giving of which instructions, in the terms aforesaid, the defendant excepted. The defendant then prayed the court to give to the jury the opinion and instruction following, to wit: That the proceedings of the orphans court of *Washington* county aforesaid, as contained in the said exemplification given in evidence by the defendant as aforesaid, and the account and distribution therein set forth, as adjusted and settled on the 17th of October 1807, are competent and sufficient evidence against the plaintiff, that all the property returned in the plaintiff's inventory, as administratrix of *Jesse Burch*, had been disposed of and reduced into money by the plaintiff, or with her assent and authority, and with the authority and sanction of the said orphans court. Which instruction the court refused to give as prayed, but instructed the jury, that the proceedings of the orphans court of *Washington* county, as contained in the exemplification given in evidence by the defendant, and the account and distribution therein set forth as having been adjusted and settled on the 17th of October 1807, (provided the jury should be opinion from the evidence that the sale made on the 24th of August 1805, by order of the orphans court, was a *bona fide* sale, and made conformable to the said order,) are competent and sufficient evidence against the plaintiff, to show that all the property returned in the plaintiff's inventory, as administratrix of *Jesse Burch*, had been administered and reduced into money

by the plaintiff, or with her assent, and that the same was sanctioned by said orphans court. To the granting of all and every of which said instructions, and to the refusal of the court to grant the defendant's instruction as prayed, the defendant excepted; and the verdict and judgment being in favour of the plaintiff, the defendant appealed to this court.

The cause was argued before BUCHANAN, EARLE, MARTIN, and DORSEY, J.

Jones, for the appellant. Without regard to the form or order in which the several questions arose in the bills of exceptions, he urged the utter inefficacy and incompetency of the decree of the orphans court in question, to invest the plaintiff with a right to prosecute this action. The objections to this decree, he stated, might be summoned under the following heads: 1. The absolute defect of power and jurisdiction in the court to pass such a decree in the absence of any express enactment whatever embracing such a case; and the implication of such a power being clearly excluded, 1st. By the positive restriction of the powers of the court in such as are expressly given by statute, and the positive prohibition of all "incidental power or constructive authority," as declared in the act of 1798, *ch.* 101, *sub ch.* 15, *s.* 20. 2d. By the very narrow limitations of its authority, as well in the subject matter on which it might exert its jurisdiction, as in the forms or modes of its proceeding, being indebted to express statutory enactments for all the most minute and subordinate details of the process, necessary to the exercise of its legitimate functions; in short, for every power deemed strictly incidental to other tribunals. 3d. By the terms of the section granting the original power to deprive an executor or administrator of the assets, and deliver the same to the security, that section providing adequate and specific remedies against the security, and by necessary implication excluding every other; that is to say, a special action on the case; besides the express powers of the court to compel the security, by attachment, sequestration, &c. to a due administration of the assets. 4th. By the evident incongruity and contradiction in terms between the original power specifically granted, to deliver the assets to the security to be administered in a certain course imperatively

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prescribed, and the power incidentally assumed to take back the same assets, and restore them to the same executor or administrator. 1798, *ch. 101, sub ch. 14, s. 11.*

2. If it were competent for the orphans court, under any circumstances, to exercise the assumed power in question, by way of a revocation of their original decree, or otherwise, it was certainly incompetent, after the complete execution of the original decree, as in this case, by the actual delivery of the assets, by a sale or pretended sale of the same, a final account and distribution *in solido*, and the actual payment by the security of one of the distributive shares, and of a debt, &c. and all this acquiesced in for eight years after the passing and consummation of the decree; in all which proceedings, if there were any fraud, abuse, or mal-practice whatsoever, the precise case was presented, either for the special action on the case provided by the act, or for the compulsory process of the orphans court, to coerce the security to a specific execution of his trust.

3. Granting the orphans court the unqualified power to pass the decree in question, still it operated, *per se*, no divesture out of the security, or investiture in the administratrix, either of the right of property or right of possession, so as to give the administratrix any possessory action in a court of common law; but such decree should have been specifically enforced by the compulsory process of the court that passed it.

4. If that decree were competent to operate, *per se*, any such divesture and investiture of the rights of property or possession, and to give such possessory action, within the same domestic jurisdiction to which the court belonged, it was utterly incompetent to operate any such effect in a foreign jurisdiction; as in this state, where both the person and property, to be acted on by the decree, were domiciled.

5. If the decree could here operate that effect in this state, as against *Kinsey Gittings*, still it was incompetent so to affect *William Scott*, his administrator—1st. Because *Gittings* had died invested with all the original rights of property and possession, conferred upon him by the original decree, the administratrix having failed to comply, in his life-time, with the condition precedent on which, by the terms of the decree, her right to the property was to

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vest. And 2d. Because the decree had not been, in any manner revived, (nor was it capable of being revived,) against the appellant as his representative; who, as such, had no sort of privity to the decree, and was not amenable to the jurisdiction of the court. Upon these grounds, alone, he contended, that the court ought to have delivered to the jury the general instruction prayed by the defendant, as stated in the second bill of exceptions, independent of the particular exceptions to the several opinions of the court excepted to on the record.

6. The right of action did not, by mere operation of law, supervene to the administratrix upon the death of the security, as erroneously inferred by the court to the jury in the second bill of exceptions.

7. The court ought to have granted the instruction upon the competency and effect of the account settled in the orphans court, and the order of distribution, as prayed by defendant in the last bill of exceptions; whereas, the court made the competency and effect of that evidence to depend upon the condition of the defendant's proving, *alimunde*, a fact, which the documentary evidence was perfectly sufficient to prove, *per se*.

8. The court erred in directing the jury, as in the third bill of exceptions, upon the validity of the sale at auction, made by *Gittings*, on the 24th of August 1805, that the sale was vitiated, if *Offutt*, the purchaser, either failed to comply with the terms of sale, or to pay the purchase money, or to have the negroes delivered, &c. and also instructing the jury, upon a mere hypothesis, that *Offutt* had made the purchase for *Gittings*, and in that case that the sale was void.

9. That the court ought to have admitted the bill of sale from the plaintiff to *Moran*, that document being competent and proper to prove—1st. That she was wasting the assets, and had given sufficient ground for the interference of the court. And 2d. That she had completely divested herself of all title. He contended that the orphans court must decide on matters within its legitimate jurisdiction. *Rose vs. Himely*, 4 *Cranch*, 241. *Wise vs. Withers*, 3 *Cranch*, 331. The sentence of the orphans court in this case is a mere nullity. *M^cMillan vs. M^cNeill*, 4 *Wheat*. 209. *Fenwick vs. Sears*, 1 *Cranch*, 259. *Dixon vs. Ramsay*, 3 *Cranch*, 319. The orphans court of *Washington*

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county in the District of *Columbia*, acts under our act of 1798, *ch.* 101, and is a court of limited jurisdiction, and its authority is very minutely prescribed, and all incidental power is prohibited. Act of 1798, *ch.* 101, *sub ch.* 14, *s.* 11; *sub ch.* 15, *s.* 12, 13, 16, 17, 20. That court might call for counter security, and the proceedings of the surety is pointed out when the property is delivered to him, *Ibid.* *sub ch.* 14, *s.* 11.

Magruder and Key, for the appellee, referred to the acts of 1795, *ch.* 17, *s.* 2; 1798, *ch.* 101, *sub ch.* 14, *s.* 11; *sub ch.* 12, *s.* 5; 1818, *ch.* 217, *s.* 3. *The State, use Chamberlain, vs. Wright*, in this court. They contended that the decree of the orphans court in 1817 was conclusive and binding on all who claimed under the defendant.

The opinion of the court was delivered by

DORSEY, J. In deciding on the bills of exceptions, two important questions present themselves to the consideration of the court—*First*, What right did *Kinsey Gittings* acquire in negroes *Rachel*, and her two children *Louisa* and *Eliza*, in virtue of the order of the orphans court of *Washington* county in the District of *Columbia*, directing the property of *Jesse Burch* to be delivered up to him, when considered in connection with his subsequent possession?

Secondly. What was the legal effect of the order of the orphans court of the 29th November 1819, by which *Kinsey Gittings* is directed to deliver up to the plaintiff the said three negroes, with their increase, on the terms therein mentioned? By the act of 1798, *ch.* 101, *sub ch.* 14, *sec.* 11, it is provided, that if any security of an executor or administrator shall conceive himself in danger of suffering from his suretyship, he may apply to the orphans court which granted the administration, and the said court may call on the party to give counter security, to be approved by the court; and if the party so called on, shall not, within a fixed reasonable time, give such counter security, the court may order the property remaining in the hands of such executor or administrator, to be delivered up to such security, and the court may enforce the delivery by process as therein after provided; and an inventory of the property delivered to such security shall be returned without delay, and the property contained in said

inventory shall be by the said security sold, distributed and delivered up, as the case may require, under the immediate order of the court, as if said security were executor or administrator. The court are of opinion, that a security who obtains the possession of the goods of the intestate, under an order made pursuant to the provisions of this law, acquires a right to them for the purpose of paying the debts of the intestate, and for the purpose of distribution. The execution of this trust imperiously requires that he should have both the possession and right of property in the effects; and as this right cannot exist in association with the previous right of the administrator, the order must necessarily operate as a divestment or extinguishment of the right derived by the administrator from the letters of administration. If such is the effect of the order, it cannot be contended with success, that upon the death of *Gittings*, the right of possession and property supervened to the plaintiff. The act in terms makes no such provision, and the law cannot imply it in favour of one who has been judicially deprived of all ownership by her default in not giving the necessary counter security. In what manner the property can be affected in the hands of the executor or administrator of the security, it is unnecessary for the court to decide, as that question is not now *sub judice*. The next inquiry is, what is the effect of the order of the orphans court of 29th November 1817? By the 15 *sub ch. sec.* 20, of the testamentary system, (1798, *ch.* 101,) it is declared that the orphans court shall not, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by that act or some other law. And to avoid the necessity of a recurrence to incidental or implied authority, the powers of the orphans court, both in relation to the subject matter of its jurisdiction, and the forms of its proceeding, are declared with the most formal and precise minuteness. Does this law then invest the orphans court with the jurisdiction and power of decreeing or ordering the goods, in any event or on any terms, to be delivered over by the security to the administrator *qua* administrator? Upon an examination of its provisions no such power can be found, and the exercise of such a power of revocation can only be countenanced by the doctrine of constructive authority; but recourse to such a principle is emphatically

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condemned by the express enactment of the statute. The administratrix must therefore be content with the only remedy which the law furnishes, and that is a special action on the case to recover damages in case she shall suffer from the misconduct of her security in diminishing any part of the property without obtaining an allowance for the same from the court. But even supposing that the orphans court had jurisdiction to pass the order of the 29th November 1817, still the plaintiff would have no right to maintain the present action, inasmuch as the order could not of itself so operate as to confer on her the right of possession and property in the negroes, before it was carried into effect by some one of the means by which that court is authorised to enforce the execution of its own decrees. Under this view of the subject, this court thinks, that *Montgomery* county court erred in refusing to direct the jury, as prayed by the defendant in his second bill of exceptions, that the plaintiff was not entitled to recover; and that they also erred in declaring to the jury, that after the death of *Gittings*, the defendant was bound, on the demand of the plaintiff, to deliver up the negroes to her. And we also think that the court below erred in refusing to permit the defendant's counsel to read to the jury the bill of sale, executed by the plaintiff to *Jesse Moran*, for three of the negroes mentioned in the declaration, as she had not shown a title to those negroes, acquired since the order of the orphans court of the 11th June 1805, which operated to divest her of all previous right. And we are further of opinion, that the court below did not err in the direction which they gave to the jury on the first prayer of the plaintiff, as set forth in the third bill of exceptions. But we dissent from the opinion expressed by the court below on the second prayer of the plaintiff, as set forth in the last mentioned bill of exceptions. They instructed the jury, that if they should be opinion, from the evidence, that the terms of sale were not complied with, or offered to be complied with, by Doctor *Offutt*, or the purchase money was not paid by him to *Gittings*, or that there was no delivery of the said negroes to said *Offutt*, that the jury may and ought to presume, that the property in the negroes was not divested, but still remained in *Gittings'* hands as part of the property belonging to the estate of *Jesse Burch*. It

cannot escape observation, that the court decided, that the omission of any one of the above circumstances constituted a ground on which the jury might presume that the sale made of the negroes by *Gittings* to *Offutt*, was not a real one. But this decision cannot be supported, as the mere omission of *Gittings* to receive the amount of the purchase money, (more especially in a case where six months credit constituted part of the terms of the sale,) cannot, *per se*, unconnected with any other circumstances, afford a presumption that the sale was collusive.

The opinion of the court below, on the third prayer of the plaintiff, as set forth in the third bill of exceptions, is correct. We consider the law to be too well established, now to be drawn in question, that an administrator cannot, at either a public or private sale, purchase in the goods of his intestate for his own benefit. But if the goods are *bona fide* purchased by a third person for his own use and benefit, without collusion between him and the administrator, neither the principles of law nor equity preclude the administrator from afterwards acquiring a right in the goods by a subsequent contract with such purchaser. The fourth prayer of the defendant, as set forth in the third bill of exceptions, was in our opinion correctly rejected by the court below; and the subsequent opinion expressed by the court, though not required by either the plaintiff or defendant, does not appear to be exceptionable.

JUDGMENT REVERSED.

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APPEAL from *Charles* county court. This was an action on the case, brought by the appellee against the appellant, for the alleged violation of a contract. The declaration contained three counts: The *first* upon a special agreement, "that in consideration that the plaintiff would permit the defendant to haul wood through her farm to her landing on the *Potomac* river, in *Charles* county, the defendant agreed and undertook to make and fix up a gate upon the said farm, and to haul to the said farm the ma-

If there is a special agreement between the parties, open and unrescinded, it is indispensably necessary that the plaintiff should declare upon it; and he must state his case as it is.

Where the contract proved in evidence varies from the contract declared upon, the plaintiff cannot recover on it; nor can he recover

on a *quantum meruit*, because there was a special agreement.

But if he declares upon a special contract, and fails to prove it, but proves an agreement and a performance of it, it raises a duty for which a general *indebitatus assumpsit* will lie.

On a writ of error the appellate court examines the entire record, and reverses the judgment if there be error in any point, though the judgment of the court below is right on the particular point by them decided.

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nure from the stables of the defendant, for the use of the plaintiff." The *second* count—"that the defendant was indebted to the plaintiff in \$500, for the use and occupation of the landing of the plaintiff on the *Potomac* river, and by her to him let for a wood landing at his request, and by him used as a wood landing for a long time; to wit, for the space of one whole year; and being so indebted," &c. And the *third* count—"that in consideration that the plaintiff would permit the defendant to haul wood through the plantation of the plaintiff to the landing of the plaintiff on *Potomac* river, and would permit him to cord up his said wood thereupon for sale or exportation, the defendant undertook and promised the plaintiff to pay her therefor so much as she reasonably deserved to have for the same; and that the defendant did haul and cord upon the said landing, in consequence of the said permission, a large quantity of wood, to wit, the quantity of 2000 cords. And the plaintiff avers, that she reasonably deserved to have of the defendant therefor another sum of \$500, of which he had notice." *Breach*, "That the defendant did not fix up a gate upon the farm of the plaintiff, nor haul the manure from his stables, as he had undertaken to do; and although often requested, hath not paid the said several sums of money," &c. The general issue was pleaded; and at the trial the plaintiff offered in evidence, that the plaintiff and defendant agreed, that the defendant should have the liberty of hauling cord-wood through her field, that was enclosed, for one year, and deposit it on her landing; that the defendant was to put up or erect two gates, one at the place where he entered with the wood, and the other where he went out, and that he was also to let her have all the manure he raised at his stables; that he commenced hauling, and did haul 675 cords of wood, without having put up the gates, or made any preparation so to do; that he commenced hauling in August, and continued to haul until November following, when the plaintiff stopped him. The plaintiff also gave in evidence, that the usual compensation for depositing wood at that landing was $12\frac{1}{2}$ cents per cord. The defendant then, on the above facts, prayed the direction of the court to the jury, that if they should be of opinion, from the evidence in the cause, that the plaintiff, before the expiration of the year, prevented the defendant from hauling and depositing the wood, that she

could not recover; which, opinion the court, [*Johnson*, Ch. J. and *Key*, A. J.] refused to give; but were of opinion, and directed the jury, that if they should believe from the evidence that the gates were not put up within the time before stated, that it was an unreasonable delay on the part of the defendant to fulfil his part of the contract, and that the breach of the same first took place on his part, and that it was competent for the jury to ascertain the damages for the breach, by taking into their consideration the worth of the accommodation to the defendant, and the injury sustained by the plaintiff, in having her field laid open during the period mentioned. The defendant excepted, and appealed.

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The cause was argued before BUCHANAN, MARTIN, and STEPHEN, J.

Stone, for the appellant, contended, 1. That the contract was not properly set out in the declaration, neither was the breach properly assigned.

2. That the contract declared on was other and variant from the contract proved.

3. That the court instructed the jury to take an improper criterion in estimating the damages.

4. That the court permitted the plaintiff to give evidence under the general counts, when she had failed under the count on the special agreement. He referred to *Coursey vs. Covington*, 5 *Harr. & Johns.* 45; and *Penny vs. Porter*, 2 *East*, 2.

No counsel argued for the appellee.

The opinion of the court was delivered by

STEPHEN, J. This is an action of trespass on the case, instituted in *Charles* county court, for the alleged violation of a contract entered into between the plaintiff and defendant. The declaration contains three counts, the first upon the special agreement; the second upon a general *indebitatus assumpsit*; the third upon a *quantum meruit*. The contract laid in the special count states, that in consideration that the plaintiff would permit the defendant to haul wood through her farm to her landing on the *Potomac* river in *Charles* county, the defendant agreed and undertook to make and fix up a gate upon the farm of the plaintiff, and to haul to the said farm the manure from the sta-

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bles of the defendant for the use of the plaintiff. The second count charges, that the defendant was indebted to the plaintiff in the sum of five hundred dollars, for the use and occupation of her landing on the *Potomac* river, as a wood landing. The third count alleges, that in consideration that the plaintiff would permit the defendant to haul wood through her plantation to her landing, and would permit him to cord up his wood thereupon, the defendant undertook to pay her so much money as she reasonably deserved to have for such licence or permission. The contract proved in evidence varies from the contract stated in the pleadings in several essential particulars. In the first place the declaration alleges, that the defendant was to erect but one gate, the proof is, that he was to erect two; one where he entered the enclosure, and another where he went out; the declaration also avers, that the defendant was to haul the manure from his stables to the plaintiff's farm; the proof is, that he was to let her have all the manure he raised at his stables. In the declaration the contract is indefinite as to the privilege in point of time, by the proof it is limited to one year. There is no principle of law more clear, or better settled, than that wherever there is a special agreement between the parties, which remains open and unrescinded, it is indispensably necessary that the plaintiff should declare upon such special agreement, in order that the defendant may be apprised of the nature of the plaintiff's claim, and may be prepared to make his defence accordingly; and it is equally clear, that when he does so declare, he must state his case as it is, so as to conform to the spirit of the rule, and give the opposite party that notice for which the rule was established. In the present case this wise and beneficial principle of the law has not been complied with, by reason of the variances above mentioned between the pleadings and the proof; and it follows, as a necessary legal consequence, that the plaintiff was not entitled to recover upon the first count in her declaration, nor has she a better right or title to recover upon the second or third. It is unquestionably true, that when a party declares upon a special agreement, and proves a contract variant from the one on which he does declare, he cannot recover on the special contract, on account of the variance, nor can he recover on a *quantum meruit*, because there was

a special contract; but if he declares upon a special contract, and fails to prove it, but proves an agreement, and the work done according to the terms of it, it raises a duty for which a general *indebitatus assumpsit* will lie. *Bull. N. P.* 139, 140. *Payne vs. Bucomb*, 2 *Dougl.* 651. In this case the plaintiff cannot recover upon the second count of a general *indebitatus assumpsit*, because, by the terms of the special agreement, the defendant, for the considerations therein mentioned, was not only to have the privilege of hauling his wood through her field for the space of one year, but was also to have the right of depositing it on her landing, for the use and occupation of which, that count seeks to recover a compensation in damages.

It is not to be doubted that the erection of the gates was in the contemplation of the parties to precede the use of the privilege granted by the plaintiff to the defendant. This is to be inferred from the subject matter about which they stipulated in that respect; the place through which the right of transit was contracted for was *an enclosure*, a gate was to be erected at the place of entrance, and at the place of departure. Circumstances strongly indicative of the purpose or object of inserting such a stipulation in the contract, and whether covenants or conditions are to be construed mutual and independent, or dependent, is always to be collected from the evident sense and meaning of the parties, and however transposed they may be, their precedence must depend on the order of time in which the intent of the transaction requires their performance. *Jones vs. Barkley*, 2 *Dougl.* 690. *Pow. on Contr.* 376, 377. The plaintiff then had a right, when this precedent condition was not fulfilled, to arrest the further exercise of this stipulated privilege, and to compel the defendant to pay for the use of it during the time he had the benefit of it, on the ground that he could not take advantage of his own wrong in not complying with the terms of the contract on his part. In this respect the court below did not err, but they erred in not instructing the jury, that on account of the variance between the contract, as stated in the declaration, and that proved in evidence, the plaintiff was not entitled to recover. That the plaintiff considered the contract as still remaining open and unrescinded, manifestly appears from the circumstance of her declaring upon it, and making it the foundation of her action. Upon a writ of

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error this court are not only authorised, but bound, to examine the whole record, and if there be error, it is their duty to reverse the judgment below, although the court were right in the opinion they gave on the particular point upon which their opinion was prayed. 7 *Bac. Abr.* 448. The court are therefore of opinion that the judgment below must be reversed.

JUDGMENT REVERSED.

JUNE.

SIDES vs. HILLEARY.

If the plaintiff, at the time of taking a promissory note, knows that the article which forms its consideration is defective, and fraudulently conceals that defect from the defendant, he can sustain no suit on the note.

Whether the plaintiff had such knowledge, and concealed it from the defendant, is a question for the jury.

APPEAL from *Montgomery* county court. *Assumpsit* on a promissory note dated the 17th of February 1819, drawn by the defendant (now appellee,) in favour of the plaintiff (now appellant,) for \$125, *Non assumpsit* and issue. At the trial the plaintiff offered in evidence the promissory note upon which the action was brought, admitted by the defendant to have been executed by him, and delivered to the plaintiff. The defendant then proved, that the consideration of the note was a pair of mill-stones, which the defendant bought and received from the plaintiff, and put up in his mill in the month of February 1819. That the stones were bad; that one of them was composed of block, soft and badly cemented, and that many of the blocks of the other were also soft and badly cemented, and were not worth the trouble of carrying from the plaintiff's to the defendant's mill. The stones were kept in the defendant's mill from the month of February 1819, to the present time, and used with difficulty in grinding plaister. The defendant also proved by a competent witness, that he (the witness,) in the month of September 1819, a few days previous to the writing by the plaintiff of the first letter hereinafter set forth, called on the plaintiff at the defendant's request, informed him that the stones were bad, and desired him to repair them; and that the same application was renewed subsequent to the date of the last letter hereinafter stated. On the second application, the plaintiff informed the witness that he could not then comply with his request. The defendant further offered in evidence the following papers, proved to be the handwriting of the plaintiff. 1st. "*Lisbon*, 17th February 1819, Mr. *Thomas Hilleary* bo't of *Benjamin G. Sides*, 1 pair 4 feet bur mill-stones \$225.

Received at the same time of *Thomas Hilleary* \$100 in cash, and his note of hand for \$125, which, when paid, will be in full.

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Benjamin G. Sides."

"I hereby warrant the above mill-stones to be good; and in case any of the blocks should not prove hard enough, I will go over to his mill and put in others that will be sufficiently hard, at my own expense.

Benjamin G. Sides."

2d. A letter dated the 24th of September 1819, from the plaintiff to the defendant. "When your plaister burs were made, the supply of blocks was but small—my journeyman who built the stones, forced in some contrary to my wishes, during my absence from the shop, although there were hard ones enough to have made them complete. If you will take the dimensions of such as are not sufficient, I will work them out, send them to your mill, and come myself to put them in the deficient places, having a wish to give general satisfaction to all my customers. You can take the length and breadth at both ends, and note them down on paper, to enable me to calculate the blocks accordingly." 3d. A letter from the plaintiff to the defendant, dated the 12th of January 1820. "Upon due consideration I find that your mill-stones could not be altered in a permanent manner unless they were taken apart. The eye-blocks could not be put in safely without separating the whole work. This would require a great deal of labour. It would not be possible for me at this time of the year to do them in time for you. In fact, you ought to have sent me a written communication during last summer and fall, and they would certainly have been done, as I requested of you early in September last. You could not have taken me in a more unfavourable time of the year. The stones will certainly do to grind plaister with another season, or else they have got to be miserably bad. I would wish you to use them till about the first of April next, and then send them to me; and if I don't make them good, I will give you the note and interest. I never was so much deceived in a pair of stones in my life. I knew three or four blocks were not hard enough, but had no idea that they were as bad as you represent them, and still have my doubts whether they are not. However that may be, I am resolved to make a firm substantial pair of burs out

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of them, if you will extend your patience to the first of April. The piece of a stone I showed you in my shop is of the hardest and closest quality of bur; I shall work on it every moderate day, and finish it off with the same quality which I intend for your runner. I can certainly make a first rate stone out of the pair you have. Were you to bring the stones here now directly, it would not be possible to do them well and in due time, as my journeyman is sick, in course I should have no help. I am resolved to do them myself altogether, without entrusting any one with them, of course my confidence will not be betrayed." On these facts the plaintiff prayed the instruction of the court to the jury, that he was entitled to recover. Which instruction the court [*Ridgely* and *Kilgour*, A. J.] refused to give. The plaintiff excepted, and appealed, the verdict and judgment being against him.

The cause was argued before BUCHANAN, EARLE, MARTIN, DORSEY, and STEPHEN, J.

Ridout, for the appellant, contended, that the due execution of the note, on which the action was brought, having been proved, the plaintiff's right to recover could not be defeated by proof of the inferior quality of the articles for which the note was given. He referred to *Greenleaf vs. Cook*, 2 *Wheat.* 13, 16. *Templer vs. M. Lacklan*, 5 *Bos. & Pull.* 136. *Farnsworth vs. Ganard*, 1 *Campb.* 40, (note.) *Tye vs. Gwynne*, 2 *Campb.* 346. *Fisher vs. Samuda*, 1 *Campb.* 193. *Curtis vs. Hannady*, 3 *Esp. Rep.* 82; and *Grenaldi vs. White*, 4 *Esp. Rep.*

F. S. Key, for the appellee, referred to 2 *Esp. Dig.* 40. (13.)

The opinion of the court was delivered by

BUCHANAN, J. If the plaintiff, at the time of taking the promissory note on which the suit is founded, knew that the mill-stones, which formed the consideration of the note, were defective, and fraudulently concealed that defect from the defendant, the consideration wholly failed, and no suit could be sustained on the note. Whether the plaintiff had or not a knowledge of the defect alleged, and concealed that knowledge from the defendant, was a question for the jury on the evidence, and the court could not

properly have instructed them, as prayed, that the plaintiff was entitled to recover.

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JUDGMENT AFFIRMED.

Berry
vs
Thompson

BERRY vs. THOMPSON.

JUNE

APPEAL from *Prince-George's* county court. *Assumpsit*. The declaration contained two counts, one for sundry matters and articles properly chargeable in an account, \$5818 40, and the other on an *insimul computassent*. The defendant pleaded non assumpsit and a set off. Issues joined.

1. At the trial the plaintiff (now appellee,) offered in evidence, that before the commencement of this suit, he had built a house for the defendant, on a farm of the defendant's; that when the house was first agreed to be built, an estimate was made out by *Nicholas Hedges*, (a competent witness in this case,) of the work then intended to be done, and which paper was finally, and before the work was commenced, signed by the defendant, and witnessed by his son *Benjamin Berry*, junr. for whose use and benefit said house and farm was intended by his father, the defendant, and who has since lived in the house, but has no deed for the land; the paper, so signed and witnessed, was read in evidence to the jury, the estimate amounted to \$2315 88. The plaintiff further proved, that work was done on the house to the amount of the estimate, and also extra work not mentioned in the estimate, amounting to upwards of \$600. The estimate does not include the foundation or foundation walls for the house, nor for any of the extra work charged. There was on the farm an old house which had a foundation, and the plan signed by the defendant, and first agreed on, and which was given in evidence, was such an one as witness believed, from its dimensions, was suited for that foundation, but that the house really erected, was put up, not on the foundation of the old house, but on a different situation, and was made of different and larger dimensions than the said plan. Some of these differences, to wit, the second story of the kitchen and the slate roof, were mentioned and proposed as advantageous alterations of the original to the defendant, and agreed to by him on the terms proposed, to wit, that the slate roof should be charged at \$100 more than the one first agreed on, and the second

On the defendant's prayer to direct the jury that if they believed that there was an express contract between the plaintiff and defendant for building a house by which the defendant was to pay a specified sum of money, then the jury could not imply a new contract, which was to destroy the original, or to be made the foundation of the plaintiff's claim.—The county court refused to give the direction; but directed the jury, that if they found from the evidence that any alterations or additions to the original plan of the building were made with the knowledge of the defendant, for which he paid, that then they might find from that fact that the original contract was rescinded; and that if it was so rescinded, the plaintiff was entitled to recover for the other additions or alterations in the building, which were made with the knowledge of the defendant, and not objected to by him at the time. On appeal, reversed.

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vs
Thompson

story of the kitchen at \$60 or \$70 more. Besides the said work on said dwelling-house and kitchen, there was put on the premises, piazzas to said house, and the usual and necessary out-houses, and a large yard and garden pailed in, the amount of which work was \$2684, and that said work was done by the plaintiff; during the time the house was building, the defendant was frequently there examining the progress of the work, and expressed no dissatisfaction with it. During the continuance of the said last mentioned work, when some of it was done, and when workmen were putting up the pailings, the defendant came and inquired of one of the workmen by whose directions they were putting up the pailings, and being told that Mrs. *Berry*, (his said son's wife,) had directed it, he replied that he had not directed it, and said no more about the pailings, or about any of the other work. All the timber for the said last mentioned work in the out-houses, piazzas and pailings, was got from the defendant's land; and two of his negroes were hired to the plaintiff, and employed by him in cutting and sawing the timber, and preparing the work; corn was furnished to the plaintiff, and his hands, out of the defendant's corn-house, and by his order, as long as the corn lasted. The plaintiff also proved, that the out buildings, and other work as aforesaid, were done in a plain and reasonable manner, and were necessary for a comfortable residence; and that the valuation and measurement of the work were made by the witnesses, *N. Hedges* and *Harbough*, (who were sworn in the cause,) in the presence of the plaintiff, and of his son, the said *B. Berry*, jr. who resided with his father in the neighbourhood, until the said building was completed, and who was often present also at other times when the said building was going on, and who appeared to be attending to the said measurement and valuation, and made no objections to it. The defendant then proved, that the farm on which the buildings were erected, was intended for his eldest son, and the dwelling-house for his residence; that the plaintiff acknowledged to a witness, sworn in the cause, that the defendant had agreed, at the time of the contract to build the house, to pay for the said dwelling-house \$2000, and refused to pay more; that the wife of the defendant's son then agreed that he should receive \$300 additional, and plaintiff in consequence agreed to undertake the work. The defendant also

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proved, that his son resided on said place, and was residing there while the plaintiff was making some of the improvements charged in the valuation aforesaid; and proved by the son, that he had given no directions about the said extra work, and knew nothing about it; that he believed it was done through his wife. He further proved, that while a person in employ of defendant, was putting up the pails, the defendant came to the place, and inquired of said person by whose direction the same was done, and was told, by the direction of the wife of the defendant's son, the defendant thereupon remarked, that he had not directed them. He also proved, that the plaintiff acknowledged that the defendant agreed, when the contract was first made, to give him for building the dwelling-house \$2000, and the wife of his son agreed to give him in addition thereto \$300, and that he could not prevail on defendant to give more. And that the plaintiff, in speaking of the agreement afterwards entered into to substitute a roof of slate in place of shingles, and another alteration about the kitchen, said the defendant was to give him \$100 more for the slate roof, and \$60 or \$70 for the second story of the kitchen. The defendant then prayed the court to instruct the jury, that if they were of opinion from the evidence, that by the original agreement between the parties the defendant was to pay the plaintiff \$2000, and by a subsequent agreement \$100 and \$60 or \$70 for the alteration agreed to be made in the original plan, then the plaintiff is not entitled to claim of the defendant more than the sum agreed upon, unless the said agreement was subsequently altered, so as to make the defendant liable. Which instruction the court [Stephen, Ch. J. Key and Plater, A. J. gave to the jury.] The plaintiff excepted.

2. The defendant also, upon the foregoing statement, prayed the court to instruct the jury, that if they believed the testimony, and that there was an express contract between the plaintiff and defendant, by which the defendant was to pay a certain specified sum of money, then the jury cannot imply a new contract between them, which is to destroy the original contract, or to be made the foundation of the plaintiff's claim. But the court were of opinion, and so instructed the jury, that if they find from the evidence that any alterations or additions to the original plan of the building were made with the knowledge of the defendant, for which he paid, that then the jury might find

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from that fact that the original contract between the parties was rescinded; and if it was so rescinded, that the plaintiff is entitled to recover compensation for the other additions or alterations in the said building which were made with the knowledge of the defendant, and not objected to by him at the time. The defendant excepted; verdict and judgment for the plaintiff, and the defendant appealed to this court.

The cause was argued before BUCHANAN, EARLE, MARTIN, and DORSEY, J.

Magruder and J. Johnson, jr. for the appellant, stated, that the questions in this case arose on the second bill of exceptions, being that which was taken by the defendant below; and they contended, 1. That there was no proof of any subsequent contract between the plaintiff and defendant, and no circumstance whence to infer a new contract, by which the defendant was bound to pay more than the sum originally agreed upon, and the additional sum for the slate roof, and 60 or \$70 for the second story to the kitchen.

2. That proof that alterations or additions were made with the knowledge of the defendant, did not authorise the jury to find that the original contract was rescinded.

3. The court erred in instructing the jury, that if the original contract was rescinded, the plaintiff was entitled to recover of the defendant compensation for the alterations in or additions to the building, because made with the knowledge of the defendant, and not objected to by him.

They contended, that where there was an express contract, the party could not resort to an implied one. For which they referred to *Toussaint vs. Martinnat*, 2 T. R. 105. *Martin vs. Court*, *Ibid* 640. *Gale vs. Reed*, 8 East, 80, 85. *Weaver vs. Boroughs*, 1 Stra. 648. 3 *Chitty's Plead.* 132, (note a,) and *Peake's Evid.* 103. The evidence of work and labour was offered in evidence in support of the first count in the declaration. This was a variance which has not been cured by the verdict. 1 *Chitty's Plead.* 401, 402. *Speake vs. Sheppard*, (*ante* 81;) and 2 *Phill. Evid.* 83.

F. S. Key, for the Appellee.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

COOKE vs. CURTIS, *et al.* Lessee.

1823.

JUNE.

Cooke,
vs
Curtis

APPEAL from *Baltimore* county court. Ejectment for a tract of land called *Burman's Forest*. The general issue was pleaded; and at the trial the defendant (now appellant,) offered to read, and did read in evidence to the jury, the following affidavit, having first proved the deponent's death, and the same having been taken at the time it bears date, and having been agreed to be read in evidence in case the deponent should die, viz. "State of *Maryland*. *Baltimore* county, sc. On this 17th day of July 1819, before the subscriber a justice of the peace in and for the county aforesaid, comes Dr. *Richard S. Kingsmore*, of *Baltimore* county, and makes oath on the Holy Evangely of Almighty God, that in the year 1809 or 1810, or thereabouts, he delivered *Rebecca Cooke*, wife of *William Cooke*, of *Patapsco Neck*, of a female child, that the child was born alive, that he assisted in the dressing it, and left it alive in five or six hours after its birth, that the child had arrived at maturity, and gave as satisfactory and full evidence of life as any child could give; that the child had been injured in the attempts to bring it into the world before he arrived, and he supposes these injuries produced its death after he went away. Sworn to before

John F. Harris, Justice of Peace, *Balto. Cy.*"

The plaintiff then offered to prove, by several competent witnesses, that the child to whose birth the said deposition refers, was not born alive as stated in the said deposition, but dead; and that the deponent, Dr. *Kingsmore*, was not present at the birth of any of the children of the Mrs. *Cooke* mentioned in the said deposition. The defendant then, to corroborate the testimony of the said deponent, offered to prove by a good and competent witness, that said *Kingsmore*, two or three days after the birth of the child mentioned in the deposition, and before the date of the deposition, did declare the same facts stated as he had deposed to. Which testimony the court [*Hanson* and *Ward*, A. J.] refused to let go to the jury, the court being divided in opinion; the defendant excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before *BUCHANAN*, *EARLE*, *MARTIN*, *DORSEY*, and *STEPHEN*, J.

If a witness swears that he was present at the birth of a child, and the opposite party proves that he was not present, such proof is substantially to defeat the credit of the witness, and his testimony may be corroborated by proof of his prior declarations

1823.

Ratrie
vs
Wheeler

R. Johnson, for the appellant, referred to 1 *Lofft's Gilb.* 279. 2 *Bac. Ab. tit. Evidence*, (K) 663, and 2 *Esp. Dig.* 519.

No counsel appeared for the appellee.

The opinion of the court was delivered by

BUCHANAN, J. We can perceive no good reason why the evidence offered and rejected should not have been received in corroboration of what was sworn to in the deposition of Doctor *Kingsmore*, a sufficient foundation for that corroborating testimony being laid by the plaintiff, in offering evidence that *Kingsmore* was not present at the birth of any of Mrs. *Cooke's* children, which was substantially to impeach his credibility. And where the credibility of a witness is attacked by the opposite party, his prior declarations may be given in evidence to show his consistency. We think, therefore, that the court below erred in not suffering the evidence offered in this case in support of the testimony of *Kingsmore*, as contained in the deposition, to go to the jury.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

JUNE.

RATRIE vs. WHEELER'S EX'r.

A copy of the will of E. W. of Virginia, was exhibited and proved in this state, and letters testamentary granted to one of the executors therein named, the other having renounced. Before granting the letters, suit had been brought, in the name of the executor to whom letters were afterwards granted, and who before the letters granted declared in the action and made protest—*Held*, that the action could not be sustained.

APPEAL from *Montgomery* county court. Debt on a single bill, executed on the 25th of July 1818, by appellant, (the defendant in the court below,) to the appellee's testatrix, *Elizabeth Wheeler*. The writ issued on the 26th of January 1820. The proferat made of the letters in the declaration, which was filed at March term 1821, was as follows: "As the letters testamentary of said *Elizabeth*, whereby it sufficiently appears to the court here, that the said *Robert* is executor of the testament and last will of the said *Elizabeth*, and hath the execution thereof." The defendant pleaded *ne unques executor*, and issue was joined on the general replication.

At the trial the plaintiff, (now appellee,) read in evidence the single bill upon which the action was founded, and the letters testamentary granted, on the 25th of May 1821, by the orphans court of *Montgomery* county, to the plaintiff, in which letters it stated, "that a copy of the last will and testament of *Elizabeth Wheeler*, of Water-

Jord, in the county of *Loudon*, and state of *Virginia*, deceased, hath in due form of law been exhibited, proved and recorded, in the office of the register of wills for *Montgomery* county, a copy of which is to these presents annexed, and administration of all the goods, &c. of the deceased, is hereby granted and committed unto *Robert Baden*, one of the executors by the said will appointed, the renunciation of *Henrietta Conn* being proved and recorded." The plaintiff there rested his case. The defendant then prayed the court to instruct the jury, that in this action the plaintiff is not entitled to recover; which the court [*Kilgour*, A. J.] refused to do. The defendant excepted, and appealed.

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Heuitt
vs
The State

The cause was argued before BUCHANAN, EARLE, MARTIN, and DORSEY, J.

B. Forrest, for the Appellant, contended, 1. That the appellee had no power to sue when the action was commenced, there being two persons named executors in the will, and this suit was brought in the name of one before letters were granted.

2. That if the appellee was authorised to commence the suit before letters were granted, he could not declare before probate of the will.

3. That the appellee could not qualify as executor in this state on producing a copy of the will.

4. That the paper produced as letters testamentary did not support the profert made in the declaration. He referred to 3 *Bac. Ab. tit. Executors and Administrators*, (E 14,) 53. *Roll's Ab.* 914. *Sir T. Raym.* 481, and the act of 1798, *ch.* 101, *sub ch.* 3, s. 13.

Magruder, for the Appellee, referred to *Sewell vs. Hepburn*, in this court at June term 1818.

JUDGMENT REVERSED.

HEUITT and RUSSELL vs. THE STATE, use of BROWN.

JUNE.

APPEAL from *Baltimore* county court. This was an action of debt brought upon *John Chalmers'* bond as sheriff of *Baltimore* county, dated the 28th of December 1814.

By consent of parties the cause was referred without any

If an award discloses the ground taken by the arbitrator in forming his opinion, the case is open to the inquirer, whether he committed

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Heuitt
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a mistake in point
of law

The sheriff's
bond is an annual
bond, and the
sures of each
year are responsi-
ble for the ne-
glects, defaults,
acts and receipts,
of their principal,
during the time
only between giv-
ing the bond pass-
ed by them, and
the execution of
the next year's
bond.

If a question of
law is decided by
an arbitrator se-
lected by the par-
ties, for the pur-
pose of finally set-
tling such a ques-
tion between
them, they are
bound by the a-
ward. *Semble.*

Under a general
submission to ar-
bitrators their a-
ward may be im-
peached for an er-
ror in law

other pleadings but the declaration, to *Henry Trapnall*, who awarded that the defendants, (the appellants,) pay to the plaintiff, (the appellee,) \$330 04 and at the foot of his award the arbitrator refers to a statement annexed, which statement shows, that to September term 1815 of *Baltimore* county court, three writs of *fiery facias* were levied on the property of *Brown*, the defendant in the said writs, (being the person at whose instance and for whose use this action was brought), leaving in the hands of the sheriff, after payment of the debts and costs for which the writs of *fiery facias* issued, \$56 41 due to *Brown*. At March term 1816, one other writ of *fiery fa- cias* was levied on the property of *Brown*, which was sold to the amount of \$500, leaving a balance, after payment of the debt and costs, \$158 16, for which the *fiery facias* issued, together with the above sum of \$56 41 as due to *Brown*, of \$398 25. From this sum \$68 21 was deduct- ed, being the amount of a judgment against *Brown*, as garnishee of *Chalmers*, leaving the sum of \$330 04 due, being the sum above awarded. The defendants objected to a judgment being entered on the award "because a sum of money has been awarded to be paid to the plaintiff by the defendants, which they were not bound to pay, the bond which they had entered into not being then in force, to wit, the sum of \$500, received for property sold on a *fiery facias*, returnable to March term 1816, at the suit of," &c. The county court gave judgment for the debt in the declaration, and costs; to be released on payment of \$330 04, by the arbitrator awarded, with interest, &c. From this judgment the defendants appealed to this court.

The cause was argued before BUCHANAN, EARLE, and MARTIN, J.

Heath, for the Appellant, contended, 1. That a mistake in law was good cause to set aside an award. 2. That the award included monies which were received by the sheriff upon a *fiery facias* issued after the expiration of the year in which the bond was given. He cited *Chace vs. Westmore*, 13 *East*, 357. *Aubert vs. Maze*, 2 *Bos. & Pull.* 371. *Delver vs. Barnes*, 1 *Taunt.* 48. *Wohlenberg vs. Lageman*, 6 *Taunt.* 254 and *Price vs. Hollis*, 1 *Maule & Selw.* 105.

No counsel argued for the appellee.

The opinion of the court was delivered by

EARLE, J. To the award returned to the court in this cause by the arbitrator, he has annexed a paper, containing a statement of the sum awarded to be paid by the appellants to the appellee, and the account on which the same in his judgment is chargeable to them. This paper is to be considered a part of the award; and as it discloses the ground taken by the arbitrator, in forming his opinion of the subject, the case is open to the inquiry, whether he committed a mistake in point of law, in the decision he made between the parties? The case submitted to arbitration, is a joint suit against the appellants, as securities in a sheriff's bond, executed on the 8th of December 1814; and the sum for which they are rendered liable by the award of the arbitrator, was received by the sheriff for property sold under a *fiery facias*, returned to March term, 1816, of *Baltimore* county court. It is plain, then, that the arbitrator undertook to determine on the liability in law of the appellants for the money thus received by the sheriff; and, that he has in this committed an error, the court cannot entertain a doubt. The sheriff's bond is an annual bond, and the securities of each year are responsible for the neglects, defaults, acts and receipts, of their principal, during the time only between giving the bond passed by them, and the execution of the next year's bond by the sheriff. From the date of the process referred to, the sheriff must have remained in office in the year 1816, which he could not have done, without executing a further sheriff's bond in the fall of 1815. The securities in this last bond are liable for the money received under the *fiery facias*, if any persons are liable for it, and not the appellants, who were securities in the bond executed in December 1814. The law question thus disposed of by the arbitrator, he intended to decide according to law, but as he was not informed, and decided erroneously, his determination is not agreeable to his own wishes, and his award ought to have been set aside on the motion made to the court below for that purpose.

It is to be observed, that this is not a distinct question of law, decided by an arbitrator selected by the parties, for the purpose of finally settling a law point between them. When such a case occurs, it will perhaps be the court's opinion that they are bound to abide by the award,

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be it right or wrong. *Price vs. Hollis*, 1 *Maule & Selw.* 107. The parties here, referred to the arbitrator all matters in variance between them, including questions of right and fact, without the slightest intimation from any quarter, that the accountability of the appellants, for the receipts of the sheriff in the year 1816, was to be considered and decided on by him. In a case of general submission like this, the authorities are clear that an award founded on a mistake in law of the arbitrator is for this reason impeachable. *Kent vs. Elstob*, 3 *East*, 18. *Young vs. Walter*, 9 *Ves.* 364. We therefore disapprove of the judgment of *Baltimore* county court, and determine that it be reversed.

JUDGMENT REVERSED.

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MCMATH vs. THE STATE, use of WHEELER.

The sureties in a guardian's bond are not released from their responsibility to the ward, where on their application to the orphans court for counter security a new bond is executed with other sureties although the orphans court by their order endeavour to release the former sureties.

APPEAL from *Harford* county court. Debt on a guardian's bond, entered into on the 17th of March 1802, by *B. Green*, junior, with the appellant, and others, as his sureties. The following case was stated for the court's opinion: *B. Green*, junior, was duly appointed by the orphans court of *Harford* county, guardian of *F. Wheeler*, at whose instance and for whose use this suit was brought, and as such executed, on the 17th of March 1802, the bond on which this action is brought, with the defendant, (*McMath*,) and others, as his sureties. On the 27th of March 1804, on the application of the defendant and *B. Bussey*, as sureties in the said bond, the orphans court ordered that *Green* should give counter security. He offered other security, which was accepted by the court; and a new guardian's bond was entered into by him to the state, on the 27th of March 1804, with *B. Green* and *J. Hopkins*, his sureties; and *McMath* and *Bussey* were ordered by the court to be released from being security for *B. Green*. At the time of passing the said order, and approval of the bond by the orphans court, the estate and property of the ward remained, and was in the hands and possession of *Green*, undiminished. On the 23d of January 1816, *Green*, as guardian to *F. Wheeler*, passed an account with the orphans court, in which the sum of £1018 9 2, was the amount of principal in the hands of the said *Green*; and on the same day the court

passed an order, directing *Green* to pay over to *F. Wheeler* all the property that came to his hands or possession, as guardian aforesaid, agreeably to the said account so passed. No part of the money appearing to be due by this account was paid, or in any manner secured to be paid. On this statement the county court gave judgment for the plaintiff, and the defendant appealed.

The cause was argued before BUCHANAN, EARLE, MARTIN, and STEPHEN, J.

R. Johnson, for the Appellant, referred to the acts of 1798, *ch.* 101, *sub ch.* 12, *s.* 3, 5; *sub ch.* 15, *s.* 12; 1807, *ch.* 136, *s.* 2; & 1816, *ch.* 154.

Murray and *Scott*, for the Appellee.

JUDGMENT AFFIRMED.

ANDREWS, *et al.* vs. W. & J. BOSLEY.

JUNE.

ERROR to *Baltimore* county court, issued on the 2d of February 1822, to remove the proceedings on a judgment by confession, by way of *supersedeas*, entered into by the plaintiffs in error, before two justices of the peace, on the 17th of November 1815, to stay execution agreeably to the act of 1814, *ch.* 84, on a judgment rendered on the 9th of May 1815, in favour of the defendants in error, against one of the plaintiffs in error.

Where a confession of judgment, by way of *supersedeas*, was entered into on the 17th of November 1815, to stay execution, agreeably to the act of 1814, *ch.* 84, on a judgment rendered on the 9th of May 1815, and a writ of error issued on the 2d of February 1822, to remove the proceedings on the judgment by confession—*Held*, that the writ of error be quashed, more than three years having elapsed from the judgment by confession and the issuing the writ of error.

Murray, for the defendants in error, moved to quash the writ of error, it having been sued out after three years had elapsed since the judgment. He cited the act of 1807, *ch.* 151, limiting appeals and writs of error to three years after the rendition of judgment.

R. Johnson, contra. The act of 1807, *ch.* 151, alludes to judgments in the general court and county courts. The writ of error in this case is on a confession of judgment under the act of 1814, *ch.* 84, taken before two justices of the peace, and by that act such confession stayed execution on the judgment until the 31st of January 1816.

WRIT OF ERROR QUASHED.

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LUCAS, Trustee of JAMISON, vs. LATOUR.

Trover for
goods mortgaged
to secure a usuri-
ous debt cannot
be sustained, un-
less the plaintiff
has tendered the
amount actually
loaned.

If the party by
whom such debt
is contracted be-
comes an insol-
vent debtor, his
trustee, under the
insolvent laws, is
equally bound to
make such tender
to entitle him to
recover the goods
mortgaged.

APPEAL from *Baltimore* county court. This was an action of trover, brought by the appellant as trustee of *Jamison*, an insolvent debtor, against the appellee, to recover the value of 594 copies of a book called *Jamison's Domestic Medicine*, and 90 volumes of other medical books. The defendant pleaded the general issue; and at the trial the plaintiff gave evidence that he was regularly appointed trustee of *Jamison*, who was duly discharged under the insolvent laws of this state. *Jamison*, before he became insolvent, applied to the defendant for a loan of money, and the defendant, about the 1st of February 1818, loaned him \$100, and between that time and the 1st of May, several other sums, making in the whole \$500. At the time of the several loans the defendant received from *Jamison* a discount of from $2\frac{1}{2}$ to 3 per cent a month for said loans; the loans were for 60 days each, and renewed at the end of the 60 days, when the same amount of discount was exacted. *Jamison* gave the defendant his promissory notes for the amount of each loan, and at the time of contracting the loans, deposited with the defendant the books and goods mentioned in the declaration, to be retained by him as a security until the money loaned by him, and secured by the promissory notes, was repaid. The books and goods were of the value of \$2029. The plaintiff, after having been appointed trustee of *Jamison*, demanded the books from the defendant, who refused to deliver them, unless he was repaid the aforesaid sum of \$500; which the plaintiff did not then, nor at any time afterwards, tender or offer to pay, nor did he offer to pay any part of it. On these facts the defendant prayed the opinion of the court, and their direction to the jury, that the plaintiff was not entitled to recover; which opinion and direction the court, [*Dorsey*, Ch. J. *Hanson* and *Ward*, A. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, MARTIN, and STEPHEN, J.

Meredith, for the Appellant. 1. The pledge of the books, under the circumstances of the case, gave no lien

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or title in them to the defendant. 2. Even should the defendant be considered as having a lien on them for the amount of money actually loaned to *Jamison*, with the legal interest on it, yet his refusal to deliver up the books, unless paid the whole nominal sum loaned, was wrongful, and amounted to a conversion. It is contended, that there was never any lien; that the contract was void in its inception, under our act of assembly relating to usury. All liens are bottomed on the contract, and this being illegal, was altogether void. This would be evident but for the case of *Fitzroy vs. Gwillim*, 1 T. R. 153; but that case is founded on false principles; there, Lord Mansfield said the parties were in *pari delicto*, and that the rule *potior est conditio possidentis*, ought to prevail. Thirty years before, he had decided otherwise in *Smith vs. Bromley*, Doug. 695, (note.) In *Clarke vs. Shee and Johnson*, 1 Cowp. 197, he takes a distinction between the violation of two sorts of prohibitions, enacted by positive law, in respect to contracts. 1. To protect weak or necessitous men from being overreached, &c. There the rule in *pari delicto*, *potior est conditio defendantis*, does not hold. 2. Prohibitions founded upon general reasons of policy. There both parties offending are equally guilty; *par est delictum*, *et potior est conditio defendantis*. The same distinction is laid down by his Lordship in *Browning vs. Morris*, 2 Cowp. 790. It is unaccountable how Lord Mansfield should, in *Fitzroy vs. Gwillim*, have nonsuited the plaintiff. This was among the last of his decisions, and soon after he was compelled, from age and infirmity, to retire from the bench. A motion was made to set aside the nonsuit, and the cases of *Clarke vs. Shee & Johnson*, and *Browning vs. Morris*, were relied on; but his lordship shifts his ground, by saying it was an equitable action. He was remarkable for his attempt to mould most actions into equitable actions. The court of equity only varies as to the mode of relief. Why is this an equitable action? Suppose a contract for the sale of land on a usurious consideration, and an ejectment brought by the seller to recover it back, would it be said it was an equitable action? Here the plaintiff does not apply for relief upon equitable grounds. He goes upon his strict legal right. The case of *Hindle vs. O'Brien*, 1 Taunt. 414, recognizes and is founded upon the same principle. But that case was

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overruled in *Roberts vs. Goff*, 4 Barnw. & Alder. 92. The rule in equity and at law is different. The case before the court is to be distinguished from that of *Fitzroy vs. Gwillim*, and *Hindle vs. O'Brien*. Here the plaintiff is a trustee of an insolvent debtor, and the rule does not apply to the assignees of a bankrupt. It may be admitted, that legal liens exist against assignees; but illegal liens do not. Assignees of a bankrupt are not bound to pay what is due on usurious contracts. *Ex parte Ship*, 2 Ves. 489. The rule is, that a usurious lender is not permitted to prove his debt against the bankrupt. Here the trustee is no party to the illegal contract, and does not come within the rule laid down in equity. Liens may be waived by the conduct of the parties. *Cortelyou vs. Lansing*, 2 Caine's Cases, 214. This is applicable to the case before the court. The defendant refused to deliver the books unless the whole sum was paid; a tender, then, of the true sum due, was wholly useless. If a creditor, whose claim is barred by the statute of limitations, gets possession of the debtor's goods on which he had a lien, he may hold them until he is satisfied. But there would have been no lien if the remedy had been taken away. *Spears vs. Hartly*, 3 Esp. Rep. 81.

Mayer, for the Appellee. In this case the plaintiff asks back from the defendant in effect not only what the law considers improper for the defendant to have exacted, but that too which he might lawfully have stipulated for. We contend, that the pledge here shall avail for the principal lent, and legal interest; the plaintiff denies that it ought to secure even that. The pledge, considered in reference to the ultimate sale and liquidation of it, may be treated here, as a virtual payment by the defendant of the money borrowed by him. And the contract, in reference to it, may be considered as executed; not merely executory, and while so, liable to be arrested in its progress to consummation. The demand of the plaintiff is to be viewed on the footing of, and subject to the principles which regulate reclamations by borrowers from usurious lenders. Much as has been said about the innocence of the borrowers, and the relative disparity of blame between them and lenders, it is nevertheless certain, that there was a time, and a very long period too, when the borrower could not recover even the usurious excess of interest paid by him on the loan.

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Tomkins vs. Bernet, 1 Salk. 22. Now the law has relented on this score; but still so far considers the borrower involved in the fault of the transaction, that it will not suffer him to recover *more* than the *usurious portion* of interest received, or rather it does not, as the plaintiff's counsel must pretend for the sake of their doctrine, consider the borrower so commendable in opposing the usurer as to reward him with the principal, and the fair interest upon it, as well as the usurious excess: The law authorises no such unseemly extortion; no such ungrateful game: The law restores to the borrower what, in good morals, he ought to ask; but so far as he has been benefitted, the law lays him under obligation to the usurious lender; and; since in the eye of law, the advantage of the loan is equivalent to the interest which the law allows, the borrower can reclaim no part of the principal, and none of that interest: Much as the law discountenances usury, it has never proceeded farther, and has reluctantly gone so far in reversing the deeds of the borrower himself. The plaintiff's counsel must show that courts have been kinder than cases prove them to be to these borrowers, before their conclusions can be recognized as law. *Browning vs. Morris*, 2 Cowp. 790: We may then safely admit, that the lender and borrower in usurious loans are not in *pari delicto*: The plaintiff must show, however, that the borrower is not only blameless, but entitled to more than commiseration, and that he is of such *pre-eminent merit* that, as a *public benefactor*, he must "receive the forfeit" of the lender's property, the principal and legal interest too, of the money which he himself has *solicited* and *enjoyed*. The pledge was delivered and vested, for what it might eventually produce, in the lender. Here is an act, then, as definitive as payment; and the analogy between the pledging, to serve a usurious contract, and a payment of money under such contract, is perfect. If, in case of payment, the borrower can recover back only the usurious part of the interest, and is forbidden to seize more, how, in the case of the pledge, can he ask back that, without paying that for which it stands, namely, the principal, and honest, legal interest? The law will not so lavishly indulge borrowers, and administer such prodigal equity to them, as to allow them to annul *their own acts* of pledging, without doing what honesty requires; so thought Lord *Mansfield* in the case, in

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point, of *Fitzroy vs. Gwillim*, 1 T. R. 154. That was no romantic decision; it was not the over-generous concession of a waining judgment, as the counsel of the plaintiff, by their very ingenious *biographical* arguments and strictures, upon Lord Mansfield, would have the court to think. That decision reposes on sound law, and wholesome well defined principles, which trench not on the spirit of the statute of usury, much less give any undue ascendancy to the usurer. The borrower in that case, as here, asked the court to set aside, to *every intent and purpose*, his own act, and unconditionally to restore to him the pledge which he himself had deliberately devoted to the usurious contract. The court found that the common law and equity in that case beautifully harmonized, and they therefore, propounded to the borrower there, the maxim that *he who asks equity, must do equity*. They might to be sure, have spoken more directly, and decided in terms more rigidly technical, and in effect the same thing. But the judgment in *Fitzroy vs. Gwillim* is not to be considered as a *merely equitable* judgment; simply because the judge adopts a sententious maxim from equity law, within which his principles are comprized, and the rule for all such cases is condensed. The truth is, that when as there, and as, pointedly here, the law is asked by a party to annul his own act, to rescind a contract executed, they will see how far the *grievance extends* before they recognize any complaint. As to the lender's requisition of *legal* interest and principal of the money lent, they can acknowledge no cause of complaint, because the *law itself sanctions* that interest; they can denounce the retainer of the pledge only as to the excessive interest; and may therefore, upon tender of principal and legal interest, extinguish the pledge. Without such tender they will say that there is neither *damnum* nor *injuria*. In other words, in all cases where a court is asked to rescind, and recall, what *by convention of parties* has been already executed, they are in effect, completely at large to examine the *injury really sustained* by the individual, and have a discretion wide as the equity, and the *morality* of the case. Where a contract is to be rescinded, or a *deed*, as here, to be *undone*, the parties must be placed in *statu quo*. *Huntt vs. Silk*, 5 East, 449. Here then equity and law meet together; the position with which Lord Mansfield crowns his judgment is strictly legal, and not loosely equitable;

the borrower may have his pledge, but all parties must be put in *statu quo*; and the lender must, therefore, have back his money, and also the interest on it, because the borrower has enjoyed it, and the lender has, by the borrower's original *solicitation*, been deprived of it. And it is certain, that where a party seeks to shield himself from liability upon any contract on account of its unlawfulness, the law will regard the part which he bore in originating the transaction, and so far as he has instigated it, so far as a request of his toward it can be proved, and an advantage be shown to have been derived by him, it is studious to make him liable. Even when a party has *requested* his partner in illegal concerns to pay on account of them a sum of money, payable too only in virtue of their original unlawful association, he has been held liable, simply upon the force of the mere request, and the consequent advantage of the payment. To this effect are *Petrie vs. Hannay*, 3 T. R. 418. *Falkney vs. Reynous*, 4 Burr. 2069. *Roe vs. Galliers*, 2 T. R. 139. *Jamieson* here has requested the money, and, obtaining it, enjoyed an advantage from the request, and by the request gave birth to the unlawful act of which he now complains. He is in *delicto*; and certainly in the situation of one who ungraciously seeks to protect himself, and profit meanly, by his own wrong.

It is, in short, indisputable, that the law will relieve only so far as there is a sincere complaint and a substantial grievance, and will suffer no one, when it administers private *civil* redress, to be rewarded, as a champion of a *public* policy, with what his own acts, and his own contract, have elicited from another. It will relieve him against extortion; but any-redress beyond that, the party, by his own connexion with the wrong, waives. Although, then, the law will allow the usurious part of interest paid to be reclaimed, no more can ever be recovered back; simply, because beyond that there has been no oppressive exaction, and beyond that it is not *honest* to solicit the aid of the law. So much effect does the law assign to the *requests* of the borrower, and so anxious is it to make his liability co-ordinate with the legal benefit enjoyed by him from the loan, that it holds him bound by a promissory note given by him to the lender for the legal amount of a usurious debt. *Barnes vs. Hedley*, 2 Taunt. 184. Here too the pledge might avail by its distinct force, as the promissory

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note just referred to, to give the principal and legal interest. All this is in the virtuous tenor of those decisions which make binding all promises to pay what is morally due, as in cases of promises to pay a debt barred, and even decided to be barred; and thus judicially precluded, by statute of limitations; or where a debtor promises, who is relieved under his certificate of bankruptcy; or where one of full age promises to pay what he has as infant contracted to pay. The borrower then, in resisting, or attempting to undo, a lien, as in this case, becomes *an actor*, and throws himself on the honest principles of law, and must be judged and bound as the debtors in the cases of the promises alluded to.

2. On rigid principles of common law, however, it might even be contended that the lien, so far from being annulled by the unlawfulness of the bargain which it attends, is by that very unlawfulness, transformed into an absolute property; and that the goods in this case have become the lender's, free from all privilege of redemption by the borrower. For it is unquestionable law, that where an estate is granted which is to cease, or an act is done which is to be of no avail, when the unlawful condition (that is, unlawful as a *malum prohibitum*,) is performed, that estate does at once become absolute, and that act can never be recalled. *Co. Litt.* 206, b. Here the lien was created, to cease upon performing the illegal condition of paying an usurious loan. We might then say under the authority of severe law, that the unlawful stipulation extinguishes all right of reducing the pledge. But Lord *Mansfield* does not insist upon such harsh conclusions, but actually relaxes the severity of law in favour of the borrower, instead, as is pretended, of favouring the lender at the expense of common law, and upon an indefinite equity.

3. From what has been said of the character, as a mere private complainant upon his real grievance, in which the borrower here opposes our lien, or in any case seeks indemnification against a usurious lender, it is evident that here he comes into court under auspices of common law, upon common law rights, and not on any peremptory forfeiture or concessions of statute. He is subject to the principles and distributive justice of bare common law. The common law settles the borrower's liability, and makes a contract for him with the lender, governed, to be

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sure, by the statute against usury, but paying respect to that statute only so far that the amount of his liability be not inconsistent with the rates stipulated by the statute. If this be so, the common law divides or retrenches the condition of the pledge, according to reason, or, in other words, modifies it according to honesty, and in due regard to the advantage legally obtained by the borrower. 1 *Saund.* 66. *Hob.* 14. *Vent.* 237. *Co. Litt.* 206, b. *Comb.* 246. There can be no doubt as to what is honestly due here to the defendant, and as little as to the advantage which from that defendant the plaintiff has enjoyed. The benefit enjoyed by him, in consideration of law, is the principal, with interest such as the law prescribes that principal to be worth. If then, under the last proposition, which has been defended, we do not show that the pledge has in fact become an absolute interest in the defendant in consequence of the unlawfulness of the condition upon which it was to be redeemed, there is, at least, reason, and indeed imperative law, for apportioning the condition of the pledge, for *reluxing* it in favour of the borrower, but not *extinguishing* it to enable him to grasp an undue advantage.

4. The present case cannot be brought within the direct terms of our statute, (1704, *ch.* 69,) against usury, so as to annul the pledge in question. That act refers to contracts and assurances, and essentially to no other matter of dealing or arrangement. It regards contracts in their executory state, not contracts executed, as a pledge is. In such a case it will leave the borrower to the redress, and subject the lender to the retribution, which the common law, administering relief under the mere policy of the statute, may afford. The pledge here is not an assurance, since the nature of a pledge does not forbid a suit to be brought on the contract which it is meant to support; but a pledge is incidental and accessorial in its relation to the transaction; it does not liquidate the contract, or absolutely impart a right, though for the purposes in view of the parties, it vests an interest, and operates as by a vested estate. The act too seems to refer to assurances which reserve the illegal interest; but here it was not the pledge by which undue interest was stipulated for; but the contract, to which the pledge was appendant, reserved it. Besides, the delivery of the pledge vested the interest in

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it in the lender, and no deed, or writing of any kind, was necessary to transfer the title to it. By an assurance, however, we understand a documentary evidence of title, or a conveyance *in pais*, or transfer by proceeding of record, of some interest, where it is proper or natural that the title or interest should in that way be conveyed. The pledge here has not been so vested in the lender, and could not be construed as an assurance if it had been, since no such process is at all necessary to a transfer by way of pledge. Within the words of the statute, or its immediate denunciation, this pledge cannot then be brought. The statute will be construed, at least, as strictly as the statute of gaming in *England* was, within which, it is known, contracts were not esteemed to be, because only "securities" were mentioned in it. Besides, although an act may by statute be void, it may avail to a certain purpose not within the mischief of the law. Thus, though a devise to a Papist be void in *England*, it nevertheless operates as a revocation of a prior devise. Here, since the pledge is, in fact, the execution of a contract, and since the object is already possessed, the law might respect the lien so far as it legally may allow interest, although the original contract, which it subserves, be void. So under the statute of frauds, though a contract must be evidenced by a writing, yet a case of parol contract, and partial execution of it by possession or otherwise, is not within the statute. Indeed, it is the natural power of a statute only to avoid contracts and assurances, as these terms have been interpreted by us, and it will not be construed to divest or render that which is already vested and executed, unless express words for the purpose be used in it.

5. It might too, be said, that this action of trover exists by a mere fiction of law; and since "equity subsists in those fictions," that a court of law will not, against equitable rights, suffer the fiction here to be used. The action of ejectment reposing on a fiction or assumption of law, courts of law do for that reason exercise an equitable control in it, and may prescribe to either party equitable terms as the condition of their aid, when asked. The gist of this action is the conversion complained of, and it is exclusively for the jury to find that. 10 Co. 57. The object of the suit is damages, and a ground of personal injury is taken, and the jury are to regard the whole circum-

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stantial justice of the case, and find a conversion, or estimate the extent of it, according to the real grievance experienced. The very nature of the action, and of the claim of which it is the vehicle, requires the jury, under the direction of the court, to administer that equity so much complained of here, and to bind the borrower to an honest concession toward the lender. An action of *debt* on our statute of usury, if we could suppose such an action admissible, would not admit of such an estimate of real damage, and would not call for such equitable discrimination. So on an action of debt for escape against a sheriff, the whole claim against the primitive defendant is recovered; but by an action *on the case*, only the amount of the actual injury sustained by the plaintiff can be recovered. In *Stone vs. Lingwood*, 1 *Strange*, 651, in an action of trover, the defendant was allowed, by way of diminution of damages, what he could not claim to deduct as a lien, or a sett-off; and this could have been done upon no other reason than the equitable power of the court and jury, in an action purely for damages, to impose on the defendant only the *true damage* occasioned by him to the plaintiff. No honest man can be at a loss, with such a criterion, to state how far the borrower here was in danger of being injured, and on what terms the pledge ought to be surrendered. Upon all these views, it is evident, that the law requires here what equity would; that in this case equity is law; and that the borrower can no more expect to have the pledge restored, without repaying the money borrowed, and the legal interest on it, than one who asks a court of equity to annul a usurious mortgage can be exempted by such a court from first paying the principal and legal interest upon the mortgage. It is said, however, that here it is the trustee of the borrower, under the application of the latter for the benefit of our insolvent laws, who claims the property; and that such a trustee is not to be treated and judged as the borrower himself would be; and it is said, that such a discrimination was made between a bankrupt and his assignee, in the case *Ex parte Skip*, 2 *Ves.* 489. But on examination it will be found, that the judgment proceeded on no distinction to that effect; but the case was simply one where a dividend was refused by the chancellor to be allowed to a sheer usurious claim, attended by no pledge, or mortgage, or collateral interest, of

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any kind. It is said too, that though in *Hindle vs. O'Brien*, 1 Taunt. 414, the case of *Fitzroy & Gwillim* is recognized; yet in *Roberts vs. Goff*, 4 Barnw. & Ald. 72, the decision in *Hindle vs. O'Brien* is overruled; and thus it is supposed that the principle of *Fitzroy & Gwillim* is rejected. But the truth is, that the decision in *Hindle vs. O'Brien* was incorrect, and could not be sustained by the principle laid down by Lord Mansfield, in *Fitzroy vs. Gwillim*; and it was right to reverse the decision; for the instrument which was supported in *Hindle vs. O'Brien* by the court, was absolutely void under the statute of usury. The case of an ejectment, *Chapline vs. Hogmire*, 1 Harr. & Johns. 29, in which a deed for usurious consideration came in question, and where the grantor recovered back the land, may be supported by the idea that there the deed, or assurance, was void, and declared therefore to be so by the court. And what has been urged as to the meaning of an assurance in the statute of usury, may show how much this case is distinguished from that of the ejectment. It is true, that in *Spears vs. Hartly*, 3 Esp. Rep. 81, the court determined that a debt barred by the statute of limitations could not be the ground of a general lien on a balance coming into the creditor's hands, after that debt became due. But the lien claimed there was a lien by operation of law, and consequently could not be supported if the remedy by law for the debt was gone; since the lien is but another species of remedy to the creditor in such a case to obtain, or secure, payment of his debt. Besides, the debt and the object claimed under the lien had not been, as here, always co-existent, but the debt, in *Spears vs. Hartly*, became due long before the means came into the possession of the creditor, which he claimed by way of lien for the debt. But it is said, finally, that if we ever had a lien upon the property in question, we have lost our right to it under the equitable modifications which we now insist on, because, when the property was demanded, we insisted on the usurious terms of the contract, and not on the equitable claims which we now make. There is no doubt, that wherever a party by law may claim a lien, he may lose it if, when demand is made for the object, he does not assert his right to withhold it under the lien. But this principle can govern only in cases of liens by allowance or operation of mere law,

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and is not applicable to a case like this, of *express pledge or lien*. In the former case the law allows the party to avail himself of such a lien, but until, and unless, he elects to take advantage of this constructive and optional lien, the law considers it no vested interest in him. Until actually asserted it is but a possible and inchoate right to the property, however well settled the privilege may be. Depending, therefore, entirely on the *claim in pais*, and on the mere *discretion* of the holder of the property, if, on the occasion proper for vindicating his right of lien, he makes a different claim, the law esteems him to have waived the lien which it allows him to secure to himself. The case of an express vested lien admits of no such waiver, and no such interpretation. It is not the *claim* of the general owner that can dissolve the lien, and put an end to his own act; it is only his compliance with the condition, or the legal portion of the condition, of that act, that can produce such an effect; and every man is bound and presumed to know the law, and how much, in such a case as this, he ought to tender. Hence, it is concluded, that the lien has not been waived here, and that this court will respect it to the extent of our claim for the principal sum lent, and the legal interest on it, considering the trustee here as identified with the borrower, upon the unquestionable principle, that the assignee of claims, whether statutable assignees or others, succeeds to the rights of, and is subject to all the equities attached to, the assignor in regard to them.

Williams, on the same side. All the authorities are reconcilable, and do not impugn the decision of Lord *Mansfield*. The statute of usury is founded on a mistaken notion. This court will not go further than the courts in *England* have gone; and though they will enforce the *penalties* of the statute, they will not in civil cases, act severely upon the mere *policy* of it. The act of assembly, and the *English* statute, are similar. Usurious transactions are not void for all purposes. The contract cannot be enforced for the usurious interest; so far only is it void. If the true sum loaned in this case had been paid, there would be no lien for the excess of interest, and the property could not be held by the defendant. Lord *Mansfield* is not inconsistent in his decisions in *Fitzroy vs. Gwillim*, *Smith vs. Bromley*, *Clarke vs. Shee* &

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Johnson, and Browning vs. Morris. It is admitted, that when the usurer comes into court to enforce his contract, he must be defeated. There is a difference between an attempt to enforce a usurious contract, and in defending it. *Fitzroy vs. Gwillim*, per Lord Mansfield. The borrower has remedy to recover all the excess of interest paid. *Clarke vs. Shee & Johnson.* If a man pays a sum of money by way of bribe, he cannot recover it back, because both parties are equally criminal. But where contracts are prohibited by positive statute, as is the case with usurious contracts, the parties are not *in pari delicto*, and the excess of interest may be recovered. *Hindle vs. O'Brien* was not an equitable application to the court; but the court considered the case as coming under equitable considerations, and applied to it the principles of Lord Mansfield. Although this decision was overruled in *Roberts vs. Goff*, yet the court, in this latter case, went upon the same principles as laid down in *Fitzroy vs. Gwillim*. This is an equitable action; and when the borrower comes into court in an equitable action, he must do equity. 7 Bac. Ab. tit. Usury, (G) 204, cites *Langford vs. Barnard*, 2 Vern. 170, pl. 156. *Bosanquett vs. Dashwood*, Cas. temp. Talb. 38. The case of *Spears vs. Hartly* is analagous to that before the court. There, the remedy only was barred, but the debt existed; it was not the case of an express lien. A man cannot set up his own illegal act to avoid his own deed. *Watts vs. Brooke*, 3 Ves. 613. *Denn. vs. Dodds*, 1 Johns. Cas. 151. In *Ex parte Skip*, the trustee was said to stand in the place of the bankrupt. It was a bill to be relieved against a usurious contract. The Lord Chancellor does not overthrow the principle, that where the usurer is brought into equity, he is permitted to get his true debt and legal interest.

Winder, in reply. Whatever title the defendant had to the books in controversy, arose from the contract. The statute makes void all contracts founded upon usurious considerations. Here money was borrowed on usurious interest, and the books deposited at the time of the loan. The possession arose on this usurious lending of money. It was not upon a legal or equitable right that the defendant held the property. The possession was founded upon an illegal consideration. In *Fitzroy vs. Gwillim*, Lord

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Mansfield said, that the plaintiff could not recover, because both parties had violated the law. Here both the parties have not violated the law; and therefore, even if his lordship was correct, this case does not come within the principle he laid down. Upon a motion for a new trial his lordship does not adhere to his reason given at *nisi prius*. He resorts to a new principle—that an action of *trover* is an equitable action. This is the only authority which says it is an equitable action. Upon this ground only could his judgment be sanctioned, and if that is erroneous, then the decision falls to the ground. Suppose this had been *replevin*, would it be said to be an equitable action? But it has been said that this is a proceeding *in rem*, and therefore equitable. The contract in this case could create no lien. The deposit was by agreement, which agreement was void, and must come within the statute which makes it utterly void, and being so, can create no right. *Chapline vs. Hogmire*, 1 *Harr. & Johns*. 29. There is no case where a court of chancery would enforce the contract, if usurious. The court have always enforced the statute of usury rigorously. Where the party comes forward to be redressed at law against iniquitous proceedings under a positive law, the courts have no discretion, but must give redress. An action of *trover* is no more an equitable action than an action of debt. The boundaries between a court of equity, and a court of law, must be preserved. Lord *Mansfield* had committed an error, and he could not get rid of it, but by resorting to a new principle. His opinions may be sett off against each other. The plaintiff might have brought a *qui tam* action against the defendant, and made him pay treble the amount, but he forbore to do so. In *Hindle vs. O'Brien*, the court went upon Lord *Mansfield's* decision. But this was overruled in *Roberts vs. Goff*. How far the court had a right to interfere with their own judgment, was with themselves; but when they discovered it to be erroneous, they were right in so declaring it. But the trustee here is not to stand as the insolvent. He comes in to enforce the rights of the creditors of the insolvent. All the legal title of the insolvent passed to the trustee. Are not the creditors innocent purchasers? Suppose the defendant was a legal assignee, without notice to the trustee he might hold until paid. The maxim of *in pari delicto*, &c. is not applicable to the plaintiff. The

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obligations on the insolvent to pay do not apply to the trustee who claims under the legal title. The case *Ex parte Skip* is full to the point. Equity will not interfere in the case of assignees of bankrupts, so as to compel them to pay usurious demands. Again, the right to make the defence relied on, is taken away by the answer given by the defendant to the plaintiff's demand for the books. He refused to deliver them unless the whole sum of money was paid. This shows, that if the true sum had been tendered, he would still have refused. Why then have tendered the true sum? He had no right to demand the whole nominal amount loaned. It was insisting upon a condition which he had no right to insist upon; and it was therefore a waiver of the tender.

JUDGMENT AFFIRMED.

JUNE.

SNOWDEN *et al.* vs. DORSEY *et al.*

An appeal will not lie from an interlocutory decree of the court of chancery, by which no question of right between the parties is decided.

APPEAL from an *interlocutory* decree of the court of chancery. The appellees filed their bill for the specific performance of a contract to convey land. The Chancellor, (*Kilty*,) in giving his decree, stated that there was sufficient proof of the contract for a conveyance, and that the bill prayed for an account as a consequence of the right to a conveyance, and a decree therefor; but that he thought proper and necessary to pass an interlocutory decree for an account, in order to ascertain the sum due on either side preparatory to a final decree. He therefore decreed, that the parties account with each other concerning the matter mentioned in the proceedings, and that the auditor should state an account from the evidence already offered, or that might be exhibited to him. From this decree the defendants appealed.

The cause coming on to be argued before BUCHANAN, EARLE, and MARTIN, J.

T. B. Dorsey, (Attorney General,) and *Taney*, for the Appellees, moved the court to dismiss the appeal. They referred to the acts of 1721, *ch.* 14, *s.* 4; 1785, *ch.* 72, *s.* 27; and 1818, *ch.* 193, *s.* 1. *Jacob's L. D.* tit. *Decree.* 2 *Harr. Chan.* 331. They admitted that there might be an appeal from an interlocutory decree, where there was some

principle decided, as in the cases of *Rawlings vs. Kerr* in 1789, *Steuart vs. Rawlings* in 1791, *Mackall vs. Wilkinson* in 1792, *Gover, et al. vs. Hall* in 1810, *Carnan, et al. vs. Turner*, (ante 63,) *Blake's Chan. Pr.* 174, 175. They also cited 2 *Com. Dig.* tit. *Chancery*, (V) 310. 2 *Harr. Chan.* 321. *Staunton vs. Oldham*, 2 *Atk.* 383. *Anon.* 1 *Ves. jr.* 93. *Graves vs. Graves*, 2 *Hen. & Munf.* 22.

Magruder, against the motion, referred to the act of 1819, ch. 144, s. 4. *Moore vs. White*, December 1819. *Berry vs. Johnson*, December 1814. *Pottinger vs. Steuart*, December 1813. *Hollingsworth vs. M'Donald, et al.* December 1807. *Warfield vs. Warfield*, 5 *Harr. & Johns.* 459. *Rutherford vs. Fisher*, 4 *Dall. Rep.* 22. *Green vs. Winter*, 1 *Johns. Chan. Rep.* 77; and *Wish vs. Bickington*, 1 *Bro. Ca. Parl.* 375.

BUCHANAN, J. delivered the opinion of the court. It is the opinion of the court that an appeal will not lie from a mere interlocutory order, by which nothing is finally settled between the parties, and such we consider the order for an account in this case, which, in the language of the chancellor, was only preparatory to a final decree, and was liable to be reviewed by him at pleasure. It settles nothing in controversy between the litigating parties; but after an account taken, the chancellor, without a bill of review might, on further proof, or on more mature consideration, have rejected the account, and dismissed the complainant's bill, if the proceedings had not been arrested by the appeal. And if upon this appeal, we were to undertake to inquire into the correctness of the order for an account, we should be obliged to go into an examination of the whole merits of the case, and in rejecting or affirming the order, to decide upon that on which the chancellor has made no decree, and which could only properly be brought before us after a final adjudication in the court of chancery.

On the suggestion, that it was the practice of this court to entertain appeals from orders of this description, we have examined, and can find no such case as this, none in which something more was not decreed, and some question of right settled between the parties, except the case of *Berry vs. Johnson*, which is said to be similar to this, but that cause passed *sub silentio*, and cannot be called into precedent.

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It is easy to perceive, that appeals from orders of this description might be productive of great inconvenience and vexatious delays, which should not be incurred without necessity; and there can be no such necessity where nothing is done conclusive upon the chancellor; but the order remains open, subject to his final disposition, and may be rescinded on motion.

APPEAL DISMISSED.

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ROBERTS vs. GIBSON'S EX'r. *et al.*

The property qualification required by the 42d article of the constitution of this state, was not intended as a fund to secure the sheriff's official creditors in addition to the bond required of him as sheriff.

Other clauses of the constitution may be resorted to in aid of the construction of that which may be doubtful or uncertain.

Where the same language is used in different clauses of the constitution, upon the same or similar subjects, it must receive the same construction, unless some particular reason to the contrary can be signed.

A, in order to make B eligible as sheriff, in case he should be elected, conveyed to him certain lands, with an agreement that they should be reconveyed, &c. B was not elected, but was returned as having the next highest number of votes to C, who was commissioned sheriff. B reconveyed the lands to A, and C dying within the time for which he was elected, B was commissioned as sheriff, according to the constitution, for the residue of the term, and gave bond, and having become a defaulter, his sureties in his bond became answerable, and paid considerable sums of money for him, and filed a bill against A, alleging that the deeds between A and B were a fraud upon the law, and that the sureties, as creditors of B, had a right to have the land sold for the payment of their debt—*Held*, that although the transaction between A and B may be considered a fraud upon the law, it did not necessarily follow that every subsequent creditor of B could take advantage of it, that if B had refused to reconvey the land to A, the law never would have lent its aid to A, who was *particeps criminis*, to obtain its restoration; nor would it enforce the performance of a contract made in violation of its policy. But if a third person, a subsequent creditor, attempts to vacate the deed of reconveyance on account of fraud against the public, he must show either that it was fraudulent against creditors generally under the statute of 13 Eliz. ch. 5, or that it was a deception or misrepresentation practised upon him, by which he was induced to become the creditor of B, and to consider the land a fund for his security.

This case is not embraced by the statute of 13 Elizabeth, ch. 5.

The sureties, having full knowledge of the deeds, and no imposition or concealment having been practised upon them by which they were fraudulently induced to become the creditors of B, and to consider the lands as his property, and answerable for his debts, are not entitled to relief.

B being dead, whether or not his heirs ought to have been made parties?

APPEAL from chancery. The bill in this case was filed on the 6th of September 1804, in the name of *Jacob Gibson, William M. Catrop, Nathan Harrington, and Benjamin Willmott*, against the devisee and executor of *Edward Roberts*. On the death of *Gibson*, his executor was made one of the complainants. The facts were these: *John Thomas* was a candidate for the office of sheriff of *Tulbot* county, at the election held on the first Monday of October 1797. On the 28th of September 1797, preceding the election, *Edward Roberts*, (the father of the appellant,) and his wife, conveyed to *John Thomas*, a tract of land called *Farmer's Delight*, with a view and intention, as acknowledged by *Roberts*, the grantor, to qualify *Thomas*, according to the 42d article of the constitution of this state, to hold said office, in case he should be elected. *Thomas* failed in the election, and *Edward Cox*, having the greatest number of votes, was elected and commissioned as sheriff; but *Thomas* was returned as having the next highest poll to that of *Cox*. On the 29th of November 1797, *Thomas* reconveyed the land to *Roberts*, in consideration of £1000, (as stated in the deed, and in the answer of the defendant,) the possession of the land having been always

held by *Roberts* from the time of his and his wife's deed of conveyance to *Thomas*. The deed from *Thomas* to *Roberts* was acknowledged before *Jacob Gibson*, the late complainant, as a justice of the peace, on the day of its date, and was recorded on the 9th of January 1798. In July 1798, *Cox* died, and *Thomas* was commissioned as sheriff, and gave bond according to law, on the 12th of July 1798, with *John Nabb* and *John Thomas*, of *Wye*, as his securities, and acted as sheriff till his death, in February 1802. Omitting to give a bond for his performance for the year 1799, within the period prescribed by law, he gave such a bond, according to the provisions of a special act of assembly, on the 31st of December 1799, with *William M. Catrop* and *Nathan Harrington* as his securities. On the 26th of November 1799, he gave a bond for his performance of the office for the next succeeding year, (1800,) with *Jacob Gibson* and *Benjamin Willmott*, his securities. The complainants state in their bill, that they entered into the securityship by the bond, dated the 26th of November 1799, on the faith of the security, which they looked to in the land conveyed by *Roberts* and wife, to *Thomas*, on the 28th of September 1797, and reconveyed by *Thomas* to *Roberts* on the 29th of November 1797; and they allege, that the deed from *Thomas* to *Roberts*, of the 29th of November 1797, is fraudulent, and that the property therein mentioned is liable for certain debts which they allege they have paid as securities of *Thomas*.

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KILTY, Chancellor, at February term 1811, as the grounds of his decree, stated, "that with respect to the parties, he must consider those originally named as being still the complainants, notwithstanding the writing filed by *Nathan Harrington*, and the deposition by *Benjamin Willmott*, inasmuch as they had not applied to the court to be struck out of the bill. As to the merits of the case, it is to be observed, that no suits on a similar account has been brought in this state, and therefore this must be decided on principles of equity, without the aid of any express authority. He considers the conveyance from *Roberts* and wife, to *Thomas*, and the reconveyance from *Thomas* to *Roberts*, under the bond for that purpose, to have been made by collusion, and to have been fraudulent as against subsequent creditors, or at least against those who became

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so on account of transactions relating to the office of sheriff; and also as against the public or the state, the executive of which was bound to commission *Thomas* on the return of the judges, who judged of his property from the land conveyed by *Roberts*. And the statute of 13 *Elizabeth*, ch. 5, he considered as extending to duties as well as debts. If *Thomas* had retained the land so conveyed to him, it would have been liable for his debts, and his public creditors, to whom the complainants have been made answerable, might have resorted to it. And the chancellor is at present of opinion, that the complainants were, on payment of such claims, entitled by substitution to stand in the place of the original creditors; and that the land must be followed in equity, and made liable to their claims, the amount of which it is necessary to ascertain, in order to ground a decree for the payment thereof, or a sale of the land for that purpose.²⁷ He decreed, that the auditor state an account. The account which the auditor stated was between *Thomas* and *Gibson*, making the former indebted to the latter \$5862 47. To this account objections were made by the defendants, but they were overruled by the chancellor, who ratified and confirmed the auditor's report, and decreed a sale of the land, unless the defendants, should, by a particular day, bring into court, to be paid to the complainants, the sum of \$5862 47, with interest, &c. From this decree *E. Roberts*, the devisee, appealed to this court.

The cause was argued before BUCHANAN, MARTIN, and DORSEY, J.

Wirt, (Attorney General of U. S.) *Magruder* and *Kerr*, for the Appellant, contended, 1. That the deed from *Thomas* to *Roberts* of the 29th of November 1797, was *bona fide*, and valid, and not fraudulent, and that the complainants had no lien, either legal or equitable, affecting the land conveyed by it.

2. That *Jacob Gibson*, one of the complainants, having had full notice of the conveyance of the 29th of November 1797, before he entered into his suretyship, was not deceived or defrauded thereby, and was not entitled to any relief against that deed.

3. That the proper parties had not been made, either as complainants or defendants.

4. That *Gibson's* own acknowledgments and declarations, as contained in the record, that he would gain by his suretyship, were a bar to his recovery.

They argued, 1. That the allegations in the bill, and the proof, did not correspond, and referred to *Clarke vs. Turton*, 11 Ves. 240. *Whaley vs. Norton*, 1 Vern. 483. *Cooper's Plead.* 7, 14, 16. *Hayward vs. Carroll*, in this court, at June term 1819.

2. That the 42d article of the constitution did not contemplate that the property qualification, required by that article as necessary for the sheriff to make him eligible as such, should be bound to all creditors, and be a fund to answer for all his defaults; and all demands upon him as sheriff, in addition to the bond required of him. It meant that there should be a bond with sureties, given by the sheriff, before he could act as such, which bond was to answer for all defaults by, and demands against the sheriff. The 5th article of the declaration of rights shows the spirit with which the framers of the constitution were actuated as to property qualifications of persons elected to office, and having a right to vote. It was not intended as a fund for the payment of debts, but to narrow down the number of persons to be selected for office, and as having a right to vote; and shows that it was to restrain the popular will. They referred to the 2d, 15th, 21st, 27th, and 30th articles of the constitution.

3. To show that this case was not affected by, and did not come within the statute of 13 *Elizabeth*, ch. 5, they referred to 1 *Fonbl.* 26, (note k.) *Doe vs. Routledge*, *Comp.* 705. *Russell vs. Hammond*, 1 *Atk.* 13. *Walker vs. Burrows*, *Ibid* 93, 94. *Newl. on Cont.* 376, 377, 384, 386. *Townshend vs. Windhaw*, 2 *Ves.* 10. *Shaw vs. Standish*, 2 *Vern.* 327. *White vs. Sansum*, 3 *Atk.* 412. *Twyne's Case*, 3 *Coke*, 80. *Nun vs. Wilsmore*, 8 *T. R.* 530. *Meux vs. Howell*, 4 *East*, 15; and *Lush vs. Wilken-son*, 5 *Ves.* 387. That the allegation, that the public is defrauded, and through the public, the creditors, and through the creditors, the sureties of the sheriff, had no foundation. This court cannot be called upon by a private individual to redress the wrong done to the community; and *Gibson* cannot stand in the place of the public. Relief is never granted where both parties are equally guilty of a breach of the law. *Lowry vs. Bour-*

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dieu, 2 *Doug.* 468. 1 *Pow. on Cont.* 201. 2 *Pow. on Cont.* 149. These cases will explain the reason of the decision in *Jackinen vs. Mitchell*. *Gibson* was not a creditor of the sheriff within the constitution. He voluntarily became surety, and did not, as a creditor, trust the sheriff; and not being a creditor, he cannot be relieved. He cannot be placed by substitution in the place of the creditors. 2 *Eq. Ca. Ab.* 203, 252, 255. 1 *Eq. Ca. Ab.* 142. 2 *Fonbl.* 299, 301, 302. *Jackson vs. Ham*, 15 *Johns. Rep.* 261. If the constitution was violated, it was not for the complainants to complain; but if it was, their remedy was at law and not in equity. *Vernon vs. Keys*, 12 *East*, 638. *Clifford vs. Brooke*, 13 *Ves.* 132. It must appear that the party claiming was deceived and defrauded; and thereby sustained an injury. The bill should state that the complainants were deceived, and while under that deception became sureties.

4. There were material and necessary persons who should be parties. The heirs of *Thomas* should be parties if the deed was null and void. *Rob. on Fraud. Convey.* 591, 592, 596, 598, 602. *Hollins vs. Barney*, in this court, at June term 1816.

5. A man defrauded with notice, if such a thing could be, can have no relief. *Cowen vs. Simpson*, 1 *Esp. Rep.* 290. 2 *Esp. Dig.* 365. *Grant vs. Naylor*, 4 *Cranch*, 236. Persons claiming by substitution must come into court with clean hands. This contest is solely between *Gibson* and *Roberts*, and *Gibson*, having knowledge of the fraud, has no right to claim contribution or substitution. *Cheesbrough vs. Millard*, 1 *Johns. Chan. Rep.* 409. *Stevens vs. Cooper*, *Ibid* 425. *Gill vs. Lyon*, *Ibid* 447.

6. The act of 1809, *ch.* 198, repealing the property qualification for appointments to office, all rights before acquired are repealed, the right and remedy thereby ceased, and there is an end of this case. *Yeaton vs. The United States*, 5 *Cranch*, 281. *The Schooner Rachel vs. The United States*, 6 *Cranch*, 329.

7. The chancellor has decreed in favour of one of the complainants only, and has said nothing with respect to the others.

T. B. Dorsey, (Attorney General,) and *Taney*, for the Appellees, stated, that it would not be contended that this case came within the statute of 13 *Elizabeth*, *ch.* 5. That

the variance between the bill and the proof was of no importance, as the complainants might resort to the general statement in their bill, and if enough appeared to entitle them to relief, they might obtain it. *Cooper's Plead.* 7.

1. It appears by the facts that the fraud commenced with *Roberts*; and whether the 42d Article of the Constitution was founded in policy or not, it must be carried into effect. The object of the constitution was, that the sheriff should *bona fide* possess, when elected, real and personal property of the value of at least £1000. His not being so possessed *bona fide* of real and personal property to that amount, but possessed of property not *bona fide*, but belonging to another, was a fraud against which the court would grant relief. They cited *Huguenin vs. Basely*, 14 *Ves.* 273. *Eastabrook vs. Scott*, 3 *Ves.* 456. *Mawson vs. Stock*, 6 *Ves.* 300. The real and personal property of the sheriff, as well as his bond, are answerable for the faithful performance of the duties of his office. *Hatcheson vs. Tilden & Bordley*, 4 *Harr. & M. Hen.* 279. Conveyances in fraud of the law are relieved against. 1 *Madd. Chan.* 240, 242. *Birch vs. Blagrave*, *Ambl.* 266. The principle of the law in respect to fraud, is the same with respect to the public, as in relation to individuals. *Evans vs. Bicknell*, 6 *Ves.* 182, 192. *Sadler & Jackson, Ex parte*, 15 *Ves.* 52, 53. *Curtis vs. Perry*, 6 *Ves.* 747. *Jackman vs. Mitchell*, 13 *Ves.* 581. Where a party enables another to commit a fraud, he is answerable for the consequences. 1 *Madd. Chan.* 205, 256. Where both parties intend a fraud, and one is not so culpable as the other, relief will be apportioned according to the degree of their criminality. *Austin vs. Winston*, 1 *Hen. & Munf.* 53. No matter, therefore, if *Gibson* was a party to the fraud, he will be relieved. *Birch vs. Blagrave*, *Ambl.* 264. As between *Roberts* and *Thomas* the deeds are valid, but as respects the public they are void. *Bedford vs. Coke*, 2 *Ves.* 116.

2. There was no evidence that *Gibson* had knowledge of the fraud, although it might be admitted that he had. Sureties paying debts are to be substituted in the place of creditors. *Ex parte, Rushforth*, 10 *Ves.* 414, 422. *Wright vs. Morley*, 11 *Ves.* 22. *Parsons vs. Breddock*, 2 *Vern.* 608. *Miller vs. Ord*, 2 *Binney's Rep.* 382. *West vs. Belches*, 5 *Munf.* 187. *Brengle vs. Creager*, 5 *Harr. &*

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Johns. 234. *Ghiselin & Worthington vs. Ferguson*, in this court at June term, 1819.

3. That the proper parties have been made, they referred to *Lee vs. Rook*, *Mos.* 318, cited in 2 *Brid. Index*, 460, pl. 5.

4. That as it respected the parties to the contract, it was valid, and was only void as to creditors. 3 *Bac. Ab.* tit. *Fraud. Cooper's Plead.* §4.

5. If the decree was erroneous in awarding the whole sum to only one of the complainants, this court was competent to correct it in that particular, and say how the money was to be appropriated.

The opinion of the court was delivered by

MARTIN, J. Many points of minor importance were presented to the court in the argument of this case, which under different circumstances ought to be duly considered, but as our opinion is formed upon the law arising upon the pretended merits of the case, as disclosed by the evidence, it is not necessary to take them into consideration. Although the bill of complaint purports to represent the interest of four complainants, three of that number, *Catrop*, *Harrington* and *Wilmot*, expressly disclaim all knowledge of the proceedings; that they were instituted without their consent, and have been prosecuted without their participation; and indeed it is evident to the most superficial observer, that although their names have been used, no attention has been paid to their interest. It appears from the evidence, that both *Catrop* and *Harrington* had paid money on account of their suretyship for *Thomas*, yet the auditor, in his report, takes no notice of their claims. He ascertains the amount due to *Gibson* alone, and seems to consider him as the sole complainant in the cause. The transaction is represented by the evidence very different from the statement in the bill; indeed the variance in detail is so great as to make it entirely another case. The bill states a joint cause of action, arising upon one bond, signed by all the complainants; the evidence is, that there were two bonds, the one by *Catrop* and *Harrington*, as securities, the other by *Gibson* and *Wilmot*, and given to secure the faithful performance of the duties of the office for different years. The bill represents the bond to have been executed prior to the reconveyance to

Roberts; the testimony proves it to have been nearly two years afterwards; and to close the climax, the bill declares an entire ignorance, on the part of the complainants, of the views and intention of *Thomas* and *Roberts*, when the land was conveyed to *Thomas*; and the testimony shows, that *Gibson* knew all, and was perfectly well acquainted with the transaction. The case presents an anomaly in judicial proceedings, and the court would not hesitate to dismiss the bill, as containing a case totally different from the testimony in the record. Let us, for a moment, inquire, if *Gibson* stands on firmer ground upon the case as disclosed by the evidence?

In the fall of 1797, *Edward Cox* and *John Thomas* were candidates for the office of sheriff for *Talbot* county. The election took place on the first Monday in October, when *Cox* had a majority of votes, and was elected sheriff, and was duly commissioned and qualified as such, and continued to act in the office until the following summer, when he died. *Thomas*, having the next highest number of votes to *Cox*, was on the return with him, and after his death was commissioned as sheriff for *Talbot* county. On the 12th of July 1798, he entered into an official bond as sheriff, with *John Nabb* and *John Thomas*, (of *Wye*,) as his securities. On the 31st day of December 1799, he entered into a second bond with *William M. Catrop* and *Nathan Harrington* as securities; and on the 26th day of November 1799, into a third bond, for the due performance of his office, with *Jacob Gibson* and *Benjamin Wilmot* his securities. *Thomas*, not being possessed of real and personal property sufficient to make him eligible as sheriff under the constitution, *Edward Roberts*, and his wife, on the 28th of September 1797, conveyed to him a tract of land called *Farmer's Delight*, in order thereby to qualify him for the office, and took from *Thomas* a bond for the reconveyance of the same. No money consideration was paid by *Thomas* for this land, but it was agreed between him and *Roberts*, if *Thomas* kept the land he was to pay *Roberts* one thousand pounds for it. *Thomas* having failed to be the first on the return at the election, on the 29th day of November 1797, reconveyed the said land to *Roberts*, his wife, *Henrietta Thomas*, being a party grantor in the deed, which was acknowledged before *Jacob Gibson* and *James Nabb*, justices of the peace, and re-

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corded in due time. *Gibson*, at the time this acknowledgment was taken, explained to Mrs. *Thomas* the object of the deed, that it was to reconvey certain land that had been conveyed to *Thomas* by *Roberts* to make him eligible as sheriff. *Thomas*, when the land was conveyed to him, and also when it was reconveyed to *Roberts*, was free from and unincumbered by debt, but died some time in the year 1802, insolvent. *Gibson* paid considerable sums of money as the security of *Thomas*, on account of his official misconduct, and filed this bill to have a sale of the land called *Farmer's Delight*, considering it a fund answerable for *Thomas's* official debts.

The first question presented for the consideration of this court, is, the true construction of the *forty-second* article of the constitution of this state, whether the property qualification required by that article was intended as a fund to secure the sheriff's official creditors, in addition to the bond required of him as sheriff? By that article it is declared, "that no person shall be eligible to the office of sheriff for a county, but an inhabitant of said county, above the age of twenty-one years, and having real and personal property in the state above the value of one thousand pounds current money. That bond, with security, be taken every year as usual, and no sheriff shall be qualified to act, before the same is given." Were we left to this article alone, to infer the intention of the convention in passing it, much difficulty might arise upon it, although even here, they point out the security they intend to provide for the safety of official creditors, that no act shall be done as sheriff until that bond be given which is directed for their protection. But we are not confined to this article alone, to ascertain their intention. We are to take the whole instrument together, and collect their views from its general context, and may call other clauses of the constitution to aid us in the construction of that which may be doubtful or uncertain. If this were the only property qualification required by the constitution, a reference to other parts for instruction might be hopeless. But that is not the case. It has required the same kind of qualifications from a variety of persons, on whom it meant to confer a privilege or bestow an office. It is a rule in the construction of statutes, and *a fortiori*, of the constitution, that where the same language is used, in different clauses

of an instrument, upon the same or similar subjects, it shall receive the same construction, unless some particular reason can be assigned to take it out of the general rule. By the *second* section of the constitution, a property qualification of fifty acres of land, or thirty pounds in money, is required of every person who shall vote for a delegate to the general assembly, and that the person elected shall have real or personal property above the value of five hundred pounds current money. By the *fifteenth* article, a senator must have real and personal property above the value of one thousand pounds current money. By the *twenty-first* article, a member of the council must possess a freehold of lands and tenements above the value of one thousand pounds. By the *twenty-seventh* article, a member of congress is required to have real and personal estate above the value of one thousand pounds; and by the *thirtieth* article, the governor must have in the state real and personal property above the value of five thousand pounds current money, one thousand pounds whereof at least to be of freehold estate. For what purpose was the property qualification required in the cases just enumerated? Was it intended as a fund for the security of creditors? The counsel for the appellees have not contended for so wild a proposition. It was to confine the privileges, or offices bestowed, to those who had at least some property at stake in the community, and from which a certain degree of respectability and standing in society might be presumed. Since, then, the same language is used in those articles of the constitution requiring a property qualification of the governor, members of the council, &c. with that of the *forty-second* relative to the sheriff, and it is conceded, that in the first cases it was not intended as a fund to secure creditors, it is fair to give all the same construction, unless some reason can be assigned to show the convention did not so intend it. The counsel for the appellees have attempted to draw a distinction between those clauses, from the peculiar nature of the duties of the sheriff; that as he was an officer into whose hands much of the public money must be placed, it is to be inferred, the property qualification was required of him for a different purpose than of the other cases mentioned in the constitution. In examining that instrument, nothing is to be found to justify that position. It affords strong evidence to the con-

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trary. Can it be supposed that the convention should deem a property qualification necessary, as a fund to secure the creditors of the sheriff, because public money may be placed in his hands, and yet that no such qualification should be required of the treasurer, who is the great depositary of the public wealth? Yet we find a treasurer is to be appointed by the legislature, and no property qualification is required of him.

If the property qualification was intended as a fund to secure the sheriff's official creditors, the constitution would have given them a specific lien upon it; that, like the sheriff's bond, it should be reserved for their benefit, in exclusion to all other creditors; for otherwise it would be useless and nugatory. Yet, it has been admitted, that is not its legal effect; that the official creditors have no lien upon it, and that it is answerable for his private debts, before he performs one official act. He can make a *bona fide* transfer of all his property, the day after he is commissioned, and his official creditors have no claim upon it. If he has one thousand pounds of real and personal property in the state, he is eligible as sheriff, although at the time of his election there may be judgment creditors against him who have a lien upon his property, and for whose use it may be sold, to ten times the amount of that sum. How then can it be considered as a fund for the peculiar benefit of official creditors, unless it is presumed that the collected wisdom of the state, the framers of the constitution, when they intended to give them this security, did not know how to carry it into effect? The creditors of the sheriff, as such, having no lien upon this property, and that it may be appropriated in many ways, in exclusion of their interest, is strong evidence, in addition to that afforded by the constitution itself, that it was not intended as a fund for their security, but that the convention had different views, perhaps those before mentioned, in requiring a property qualification.

It has been contended, that although the property qualification was not intended as a fund to secure the creditors of the sheriff, yet the deeds between *Roberts* and *Thomas* were a fraud upon the law, and *Gibson*, as a creditor of *Thomas*, has a right to have the land sold for the payment of his debt. Admit the position to be correct, that this transaction may be considered a fraud upon the law, it

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Does not necessarily follow that every subsequent creditor of *Thomas* can take advantage of it. If *Thomas* had refused to reconvey this land to *Roberts*, the law never would have lent its aid to *Roberts*, who was *particeps criminis*, to obtain its restoration; it would not enforce the performance of a contract made in violation of its policy; but if a third person, a subsequent creditor, attempts to vacate the deed of re-conveyance on account of the fraud against the public, he must show, either that it was fraudulently against creditors generally under the statute of 13 *Eliz. ch. 5*, or that it was a deception, or misrepresentation, practised upon him, by which he was induced to become the creditor of *Thomas*, and to consider the land a fund for his security.

It would be superfluous to make any remarks on the operation of the statute of *Elizabeth*, for although it is considered by the chancellor as a strong ground to support his decree, it has been disclaimed and abandoned by the counsel for the appellees; they have admitted this case is not embraced by the statute, and therefore it is unnecessary to assign the reasons why the court concur with them in that concession.

Does this record then afford any evidence to show *Gibson* was in a predicament to complain of the fraud against the law? Was he an innocent creditor, deceived and defrauded by a secret agreement between the parties, of which he had no knowledge, and against which he could not guard himself? Was any imposition or concealment practised upon him, by which he was fraudulently induced to become the creditor of *Thomas*, and to consider this land as his property, and answerable for his debts? So far from it, it appears he was conversant with the whole transaction for more than two years before he became the security of *Thomas*; he had a perfect knowledge of the views of the parties from the commencement to the completion of the business. He tells *Mrs. Thomas* the deed to her husband was intended to make him eligible as sheriff; yet he claims relief in his bill, because he did not know, at the time he entered into the bond with *Thomas*, there was a secret agreement between the parties.

But is *Gibson* himself untainted with the fraud against the public, of which he now so loudly complains? Is he *rectus in curia*, and entitled to relief in a court of equity?

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The degree of moral and legal guilt, between him who commences, and he who aids in the consummation of a fraud against the public, knowing one is intended, is so slight, as to be almost imperceptible. 'Tis true it does not appear that *Gibson* was a party to the original fraud; but did he not, with a knowledge of that fraud, lend his aid to the parties to consummate it, and practice it upon the public? By the constitution *Thomas* could not have been elected sheriff without possessing property to the value of one thousand pounds, and to make him eligible; *Roberts* conveyed to him this land; this was a fraud upon the policy of the law. But had it stopped here, the fraud could have produced no injurious effect; no creditor could have suffered by it, because *Thomas* could do no act as sheriff, until he gave a bond; with security, for the faithful performance of his office. *Gibson* knew the fraud had been contemplated, and partly executed. He knew it could produce no effect without a bond and security, and yet, with a full knowledge of all the facts, he becomes the security in the bond, and thereby enables the party to practice the fraud upon the public. He was a volunteer with notice, and does not come into a court of equity with clean hands, when he claims relief against a fraudulent transaction, which could have produced no injury, without his aid to carry it into effect.

The court think the decree of the chancellor is erroneous and ought to be reversed.

DECREE REVERSED.

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BEND vs. THE SUSQUEHANNA BRIDGE and BANK COMPANY.

Where the execution of a power of attorney was stated to be by "J. H. P., by my attorney S. C."

transferring to W.

B certain shares of stock, and signed and sealed by S C and under written "Atty. for W B"—Held, that

it was executed so as to transfer the stock to W B

If the habendum in a deed of bargain and sale is to the grantor, it shall be rejected, and the use

entire to the grantee

In a charter creating a corporation, subscriptions were authorised for raising the capital stock, to

be paid by instalments, and when a certain amount was subscribed, the proprietors of shares, either

as subscribers or assignees of such subscribers, were created a body politic. H. P. who was a sub-

scriber, assigned his stock to W B before the whole of the instalments were paid.—Held, that there

was such a privity between the corporation and W B as enabled them to sustain an action of *assump-*

sit against him for the amount of the instalments which had not been paid

Parol evidence is not admissible to prove that an assignment of stock was intended as a mortgage,

when upon its face it purported to be an absolute assignment.

APPEAL from *Baltimore* county court. *Assumpsit* by the appellees, (the plaintiffs in the court below,) against the appellant, (the defendant in that court,) to recover the

transferring to W. B certain shares of stock, and signed and sealed by S C and under written "Atty. for W B"—Held, that

it was executed so as to transfer the stock to W B

If the habendum in a deed of bargain and sale is to the grantor, it shall be rejected, and the use

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scriber, assigned his stock to W B before the whole of the instalments were paid.—Held, that there

was such a privity between the corporation and W B as enabled them to sustain an action of *assump-*

sit against him for the amount of the instalments which had not been paid

Parol evidence is not admissible to prove that an assignment of stock was intended as a mortgage,

when upon its face it purported to be an absolute assignment.

amount of three instalments of \$5 each on 100 shares of stock in the company of the plaintiffs, alleged by them to belong to the defendant. The general issue was pleaded. At the trial below, the plaintiffs read in evidence the acts of assembly of 1808, *ch.* 111; 1812, *ch.* 143; 1814, *ch.* 66, and 1817, *ch.* 153. They then proved that more than two thousand shares of stock were subscribed, and that the company went regularly into operation; and that one *Moses Poor* subscribed in his own name for one hundred shares; that the president and directors for the time being, made calls in pursuance of the provisions of said acts of assembly for three instalments of five dollars on each share, which calls were complied with by *Poor*; that afterwards, on the 21st of September, in the year 1816, *Poor*, by power of attorney, duly constituted *Samuel Clendenen* his attorney, to transfer the said one hundred shares of stock to one *John H. Poor*, and that *Clendenen* did, on the 3d of October, 1816, in pursuance of said power, duly transfer the said stock to *J. H. Poor*, on the books of said bank, according to law; that afterwards, on the 30th November 1816, *J. H. Poor*, by power of attorney, authorised *Clendenen*, as his attorney, to transfer the said one hundred shares of stock to the defendant, with the consent of the defendant; and that on the tenth day of December 1816, *Clendenen*, in pursuance of said last power, executed the following assignment of said stock on the books of said bank.

"I, *John H. Poor*, by my attorney, *Samuel Clendenen*, do hereby transfer and make over unto *William B. Bend*, one hundred shares of stock held by me in the *Susquehanna Bridge and Bank Company, Maryland*, on which thirty per cent. has been paid, subject to the payment of the remaining seventy per cent. agreeably to the charter of incorporation.

Witness the hand and seal of *Samuel Clendenen*, (Seal.)
this 10th Dec. 1816." Att'y. for *Wm. B. Bend*."

This assignment was accepted by the defendant. Afterwards, the president and directors of the company, for the time being, duly called for the three following instalments on said stock, of five dollars on each share, payable as follows, viz. on the 1st of October, 1818; on the 31st of December, in the same year, and on the 1st of April, 1819; and that due notice was given of these calls, by

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publication in the newspapers, according to the provisions of the acts of assembly aforesaid. The defendant then offered evidence to show that the said stock was transferred by *John H. Poor* to him, by way of mortgage, to secure a debt antecedently due by the said *Poor* to him; to the admission of this proof, the plaintiffs objected, and the court sustained the objection. The defendant then, prayed the court to direct the jury, that the plaintiffs were not entitled to recover, which direction the court, [*Ward A. J.*] refused to give. The defendant excepted, and appealed to this court.

The cause was argued before BUCHANAN, EARLE, and STEPHEN, J.

R. Johnson, for the Appellant, contended; 1. That there was no privity between the plaintiffs and the defendant to support the action of *indebitatus assumpsit*.

2. That the assignment to the defendant by *Clendenen*, as attorney for *J. H. Poor*, was not properly made.

3. That the evidence offered by the defendant ought to have been received.

On the *first point* he referred to *Allstan's adm'r. vs. Contee's Ex'r.* in this court, at June term 1818. 6 *Bac. Ab.* 383, 384. 2 *Mod.* 57. The act of 1817, *ch.* 153, s. 6: *Spencer's case*, 5 *Coke*, 17, (3d Resol.) 1 *Esp. Dig.* 105, (202,) 106, (203.)

On the *second point*, to *Harper vs. Hampton*, 1 *Harr. & Johns.* 708. *Frontin vs. Small*, 1 *Str.* 705. 2 *Ld. Raym.* 1418. *Comb's case*, 9 *Coke*, 76. *Smith's Lessee vs. Perry*, 1 *Harr. & Johns.* 706, (note;) and *White vs. Cuyler*, 6 *T. R.* 176.

On the *third point*, to 2 *Com. Dig.* 530. *Pawling vs. The United States*, 4 *Cranch*, 219. *Shermer vs. Beale*, 1 *Wash.* 15. *Champlin vs. Butler*, 18. *Johns. Rep.* 169. *Straton vs. Rastall*, 2 *T. R.* 366. *Harris vs. Johnston*, 3 *Cranch*, 311. *The Maryland Insurance Company vs. Reeden*, 6 *Cranch*, 338. *Norwood vs. Norwood*, in this court at December term 1807. *The Marine Bank vs. Byus*, in this court at June term 1818. *Eaton vs. Jacques*, 2 *Doug.* 455. *White vs. Cuyler*, 6 *T. R.* 176.

Murray, for the Appellees, on the *first point* referred to the acts of 1812, *ch.* 143, s. 4; 1814, *ch.* 66, s. 4, 17; and

1817, ch. 153. *The Huddersfield Canal Company vs. Buckley*, 7 T. R. 36.

On the second point, to *Howell vs. M'Ivers*, 4 T. R. 690. *Comb's case*, 9 Coke, 76. *Wilks vs. Back*, 2 East, 142. 1 *Phill. Evid.* 416. *Shep. Touch.* 59. *Lightfoot vs. Tenant*, 1 Bos. & Pull. 557.

On the third point, to *Lucas vs. Comerford*, 1 Ves. jr. 235. *Williams vs. Bosanquit*, 1 Brod. & Bring. 262. 2 *Bac. Ab. tit. Covenant*, (E 3,) 72.

The opinion of the court was delivered by

BUCHANAN, J. The action was brought to recover the amount of three instalments, of five dollars each, on one hundred shares of stock in the *Susquehanna Bridge and Bank Company*, alleged by the plaintiffs to belong to the defendant. *Moses Poor* subscribed in his own name for the stock in question, and afterwards duly appointed *Samuel Clendenen* his attorney, to transfer it to *John H. Poor*; in pursuance of which power, *Samuel Clendenen* did, on the 3d of October in the year 1816, transfer the said stock, on the bank, to *John H. Poor*, according to the provisions of the charter. On the 30th of November 1816, *John H. Poor* regularly constituted *Samuel Clendenen* his attorney, to transfer the said one hundred shares of stock to the defendant, with his knowledge and consent; and on the 10th of December 1816, *Samuel Clendenen* made an assignment of the stock, on the books of the bank, to the defendant, in these words: "I *John H. Poor*, by my attorney, *Samuel Clendenen*, do hereby transfer and make over unto *William B. Bend*, one hundred shares of stock held by me in the *Susquehanna Bridge and Bank Company, Maryland*, on which thirty *per cent.* has been paid, subject to the payment of the remaining seventy *per cent.* agreeably to the charter of incorporation;"—which is signed and sealed by *Samuel Clendenen*, and underwritten "Att'y. for *Wm. B. Bend.*" The charter authorises the transfer of stock at the bank by any holder, either in person or by attorney; and the first question raised in the discussion of the cause, is, whether the power given by *John H. Poor* to *Samuel Clendenen*, was so executed as to transfer the stock in question to the defendant? Of which we have no doubt. It is very certain, that in point of law the act done under a power of attorney, must be the act of the principal, and

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not of the attorney, otherwise it cannot have the effect to bind the principal, and here the act done, that is, the assignment and transfer of the stock, is emphatically the act of *John H. Poor*. It expressly purports, upon the face of it, to be a transfer of *John H. Poor*, by his attorney, *Samuel Clendenen*, and being so expressed in the body of the instrument, it was sufficient for *Clendenen* to sign and seal it, without any addition of the character in which he acted, that character being before distinctly set out; and as the assignment is clearly expressed, and manifestly appears to be the act of the principal, *John H. Poor*, through the agency of his attorney, *Samuel Clendenen*, the superaddition of the words, "Att'y. for *Wm. B. Bend*," cannot have the effect to defeat it; but being repugnant to the whole context, must be rejected, on the same principle, that where the *habendum* in a deed of bargain and sale is to the grantor, it shall be rejected, and the use enure to the grantee; or it may be, that *Samuel Clendenen* was as well the agent in that transaction of *William B. Bend*, as attorney for *John H. Poor*, and that he placed the words "Att'y. for *Wm. B. Bend*," under his signature, to denote that agency. That he could not have been the attorney of *Bend*, for the purpose of making the transfer, is most manifest, he being the party receiving, and not the party making the assignment; and it is not easy to suppose that *Clendenen*, in adding the words "Att'y. for *Wm. B. Bend*," intended to deny his agency for *John H. Poor*, which he had before so distinctly affirmed. It was, therefore, either an act of mere inadvertency, or it was done to show the double capacity in which he may have acted; and in neither case does it vitiate the assignment, but is wholly inoperative. It is enough that the transfer was made in the name of *John H. Poor*, and that it sufficiently appears to be his act, through the agency of his attorney, for which no particular form of words is required to be used.

As to the question, whether there is such a privity between the plaintiffs and the defendant, as to enable the plaintiffs to sustain an action of *assumpsit* against the defendant for the amount of the instalments, which form the subject of the suit, there can be no doubt. The transfer of stock by the holders, is authorised by the charter; and by the assignment, the assignees are substituted in the places of the original subscribers, and hold the shares

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on the same conditions, and are subject to the same rules and orders. The calls for the instalments in question were made by the plaintiffs in pursuance of the provisions of the charter, and after the transfer by *John H. Poor* to the defendant; and the charter authorising transfers of stock, and declaring all "who may become the actual proprietors of shares in the capital stock, either as subscribers for the same, or as the legal representatives, successors, or assignees of such subscribers," to be a body politic and corporate, necessarily creates a privity, and raises an *assumpsit* on the part of such as choose to become stockholders, by accepting transfers to pay all such calls as may be regularly made, on which an action will properly lie. Moreover, by the very terms of the assignment, the defendant took the stock, subject to the payment of the whole amount that was then unpaid; and it is no objection to say, that such a construction of the charter would be injurious to the bank, on the ground that it would thereby lose its remedy against the original stockholders, seeing that the charter has provided an abundant security against loss, by creating adequate forfeitures for nonpayment of the instalments called for, and prohibiting any transfers by stockholders indebted to the bank, until such debts shall be paid. In support of the position, that the defendant is answerable in an action of *assumpsit* for the amount of the calls made, since he received a transfer of the stock, if indeed such a position needs any support, see the case of *The Huddersfield Canal Company vs. Buckley*, 7 Term Rep. 36, which is directly in point.

At the trial of the case below, the defendant offered evidence to prove, that the assignment of the stock in question was not intended as an absolute transfer, but as a mortgage to secure a debt due to him from *John H. Poor*, which was rejected by the court; and it is urged here in argument, that the testimony ought to have been admitted; which presents the constantly returning question, whether parol evidence is admissible to contradict a written instrument? Assuming different shapes, and varying with the various transactions between man and man, and each claiming to be an exception from the general rule, "that parol evidence cannot be admitted to contradict, add to, or vary the terms of a will, deed, or other written instrument." It is not necessary to inquire, how far the liability of the

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defendant to an action of *assumpsit* for the amount of the instalments claimed in this suit, would be affected by the fact, if true, that he holds the stock only as a mortgagor, if the evidence offered to establish that fact was properly rejected; and we think that it was clearly inadmissible, being offered by an immediate party to a sealed instrument, to contradict and change the terms of it, for the purpose of defeating rights claimed, and growing out of that very instrument alone, with nothing to take it out of the operation of the general rule of evidence, but in direct violation of it.

JUDGMENT AFFIRMED.

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KARTHAUS vs. OWINGS.

The true construction of the words "*prosecute with effect*," in an appeal bond, is that the appellant shall prosecute the appeal to a successful termination, or a reversal of the judgment.

Where a judgment in replevin for the return of the goods shall be affirmed, the value of the goods, (if they have not been restored,) & the costs of suit, would seem to be the true standard by which the damages of the appellee should be measured on a suit brought on the appeal bond.

In an action on such an appeal bond, the plaintiff should reply to the plea of performance, that the defendant did not prosecute his appeal with effect, whereby he had sustained damage to such an amount.

If a plea, avowry or replication, each of which is entire, be bad in part, it is bad for the whole.

A plea of tender cannot be rejoined to part of a replication, and a demurrer to the residue.

The debt or duty continuing, a tender should be pleaded with a *proferet in curia*; and it should conclude, praying judgment whether the plaintiff ought to recover any damages by reason of the non-payment of the sum alleged to have been tendered.

APPEAL from Baltimore county court. Debt on an appeal bond. The defendant below, (now appellant) pleaded *general performance*, to which there was the following replication: "And the said Owings, by his said attorneys, saith, that by any thing in the said plea of the said Karthauss pleaded, he ought not to be precluded from having and maintaining his action aforesaid against him the said Karthauss, because protesting that the said Karthauss, in the condition of the said writing obligatory mentioned, from the time of making the said writing obligatory, hath not well and truly observed, performed, kept and fulfilled, all and singular the matters and things in the condition of said writing obligatory mentioned and contained, which he, according to the condition thereof, ought to have observed, performed, fulfilled, and kept, to wit, at the county aforesaid, as the said Karthauss in his said plea hath alleged; for plea nevertheless thereto the said Owings, by replying, saith, that after the making of the said writing obligatory, and before the impetration of the original writ of him, the said Owings, in this cause, it was, on the judgment of said Baltimore county court, and the appeal aforesaid in the said writing obligatory mentioned, in such manner proceeded between the said Karthauss, and the said Owings, in the said court of appeals, that the said judgment of Bal-

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Baltimore county court was, at a court of appeals held at the city of *Annapolis* on the sixteenth day of December 1811, in all things affirmed and ratified; and it was then and there by the said court of appeals further considered and adjudged, that the said *Owings* should have execution against the said *Karthaus* for the costs and charges adjudged against him in *Baltimore* county court as aforesaid; and it was also considered and adjudged by the said court of appeals, then and there, that the said *Owings* should have a return of the said goods and chattels to be detained by him irrepleviable for ever; and it was also then and there further considered and adjudged by the said court of appeals, that the said *Owings* should recover against the said *Karthaus* the sum of fifty-five dollars and fifty-eight cents current money, for his costs and charges, in that behalf expended and sustained, by reason of his delay on his execution aforesaid, by the pretence of prosecuting the said appeal for correcting of errors of and upon the said premises, by the said *Karthaus*; as by the record thereof in the said court of appeals remaining more fully appears. And the said *Owings* avers, that the said *Karthaus* hath not paid or satisfied to him, the said *Owings*, the damages, costs and charges, so adjudged to him the said *Owings* in said county court, and the said sum of current money, so adjudged to the said *Owings* by the said court of appeals, or any part thereof, or either of them; and that he the said *Karthaus* hath not made return of the said goods and chattels to him the said *Owings*; and this the said *Owings* is ready to verify, and so forth. Wherefore he prays judgment, and his debt aforesaid, together with his damages sustained by occasion of his detention thereof, to him to be adjudged, and so forth."

The defendant rejoined a tender as to part, and demurred as to the residue, as follows: "And the said *Karthaus*, by his said attorneys, as to the said replication of the said *Owings* to the plea of him the said *Karthaus* saith, that the said *Owings* ought not, by reason of any thing by him in that replication alleged, to have or maintain his action aforesaid thereof against him the said *Karthaus*, because he saith, that as to the costs and charges adjudged to him the said *Owings*, in the county court aforesaid, and the said sum of current money adjudged to the said *Owings*, by the said court of appeals, he the said *Karthaus* has always

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been ready to pay and satisfy the same, and did, before the impetration of the writ in this cause, to wit, on the first day of November 1817, at the county aforesaid, tender to the said *Owings* all the said costs and charges so as aforesaid adjudged to the said *Owings* by the said county court, and the said sum of current money so as aforesaid adjudged to said *Owings* by said court of appeals; and this he is ready to verify. Wherefore he prays judgment, if the said *Owings* his action aforesaid thereof ought to have or maintain, and so forth. And as to so much of said replication as alleges that the said *Karthauss* hath not made return of said goods and chattels to him the said *Owings*, in manner and form as the same is set forth, the said *Karthauss* saith it is not sufficient in law for the said *Owings* to have or maintain his aforesaid action thereof against him the said *Karthauss*, and that the said *Karthauss* is not bound by the law of the land to answer the same, and this he the said *Karthauss* is ready to verify: Wherefore, for want of a sufficient replication in this behalf, he the said *Karthauss* prays judgment if the said *Owings* ought to have or maintain his said action thereof against him, and so forth." The plaintiff *demurred* to the *rejoinder* as to part, and *joined* in *demurrer* as to the residue, as follows: "And the said *Owings*, as to such parts of the *rejoinder* of the said *Karthauss*, as relates to the costs and charges adjudged to him as aforesaid by the said county court and court of appeals, and the tender of the same in the said *rejoinder* alleged, in the manner and form in which the same is set forth, he the said *Owings* saith, that the same is not sufficient in law to preclude the said *Owings* from having and maintaining his said action against him the said *Karthauss*, and that he the said *Owings* is under no necessity by the law of the land otherwise to answer the same, and this he is ready to verify: Wherefore, for want of a sufficient *rejoinder* in this particular, he the said *Owings* prays judgment for his debt, damages and costs aforesaid, to be to him adjudged, and so forth. And as to the residue of the said *rejoinder* of the said *Karthauss*, the said *Owings* saith, that the matters in the replication aforesaid of him the said *Owings* contained, are sufficient in law to enable the said *Owings* to have and maintain his action aforesaid against him the said *Karthauss*, and so forth." The defendant *joined* in the *demurrer* to the *rejoinder*. The coun-

ty court, *pro forma*, overruled the demurrer to the replication, and ruled good the demurrer to the rejoinder. An inquiry at bar was ordered, and an inquisition returned, assessing the damages sustained by the plaintiff to \$10,271 53, and \$10 costs; upon which inquisition judgment was rendered for \$25,000 the debt, being the penalty of the bond, and the above costs, and costs of increase, to be released, &c. From this judgment the defendant appealed.

The cause was argued in this court before BUCHANAN, EARLE, MARTIN, and DORSEY, J.

Winder, for the Appellant. The questions which arise are, 1. Whether the plea of tender by the defendant is good for that part of the plaintiff's demand to which it applies? 2. Whether the breach assigned by the plaintiff for not returning the goods ordered to be restored by the judgment of the court in an action of replevin, is within the condition of the appeal bond on which the suit is founded? The appeal bond presents two conditions to free the appellant from its obligation. 1st. He shall prosecute the appeal. 2d. He shall pay the damages and costs awarded in both courts, in case the judgment is affirmed. The *first* is complied with by bringing the record into this court, as directed by the act of 1713, *ch. 4, s. 4*. The *second* is, that he shall pay such damages and costs as shall be awarded and adjudged in both courts. The court cannot enlarge the terms of the bond, so that if the appellant paid the damages and costs, it is sufficient to discharge him. If the plea of a tender, to which the plaintiff demurred, is a good plea, the judgment must be reversed.

Taney and *R. Johnson*, for the Appellee, contended, 1. That the plea of tender was not well pleaded. That in such a plea the defendant must aver that he was ready to pay, and that he is still ready, and he must bring the money into court. 6 *Bac. Ab. tit. Tender*, (H.) The plea of tender in an action of *debt* is not in bar to the action, but to the recovery of damages. 1 *Tidd's Pr.* 621. The form of the plea is given in 2 *Chitty's Plead.* 432, 469. 2. That the meaning of the words in the condition of an appeal bond, "*to prosecute the appeal with effect*," was to reverse the judgment, or to effect some other successful termination of the appeal. *Johns. Dict. tit. Effect.* The appeal bond is to

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secure the appellee from the insolvency of the principal, and all antecedent sureties given; for instance, the sureties in the replevin bond. The breach in the replication is correctly assigned: It shows the damage sustained by not prosecuting the appeal with effect, and that the goods, &c. had not been returned, which constituted a part of the damage sustained.

The opinion of the court, was delivered by

DORSEY, J. On the argument of the demurrers in this case, the true construction of the appeal bond, on which the present suit was instituted, has been brought into discussion. On the part of the appellant, it was contended, that the words "prosecute with effect," mean that the party praying the appeal, shall prosecute it to final judgment, while the other side insisted, that these words imposed on the appellant the necessity of prosecuting the appeal to a successful termination, or a reversal of the judgment. This court are of opinion, that the construction adopted by the appellee's counsel, is the correct one. It is certainly warranted by the grammatical meaning of the terms used; and if a different interpretation was to prevail, the bond would only be a security in those cases where the judgment below was given for debt, damages and costs, and for damages and costs, and judgments in replevin for a return of the property, (being judgments *in rem*.) would necessarily be exempt from the operation of the bond. The act of 1713, ch. 4, which prescribes the form of the appeal bond, declares, that no execution on any judgment shall be delayed, or any *supersedeas* on such judgment granted, upon any appeal or writ of error, unless a bond, with sufficient sureties, be executed. If the appeal and execution of the bond operates as a *supersedeas* of an execution on a judgment in replevin, it would seem, on principles of justice, that the security should be as comprehensive in such a case, as where the judgment was for money; upon the affirmance of a judgment for money, the obligors are imperatively answerable for the amount of the debt, damages and costs; the delay occasioned by the appeal being the price paid by the appellee for the additional security; and where a judgment in replevin, for the return of the goods, shall be affirmed, the value of the goods, (if they have not been re-

stored,) and the costs of suit, would seem to be the true standard by which the damages of the appellee should be measured on a suit brought on the appeal bond. If the appellant should dismiss his appeal, this rule would certainly prevail; and it is difficult to conceive, how the security of the appellee can be lessened, in the event of his judgment being affirmed, as the delay occasioned by the *supersedeas* would not be greater in the former than in the latter case, but generally less.

Having expressed our opinion on the true construction of the bond, we will next advert to the pleadings in the cause, and we think the replication cannot be sustained. The plaintiff assigns his breach in the nonpayment of the costs of the inferior and appellate courts, and in the appellants not having made a return of the goods and chattels, in conformity to the judgment of affirmance. This mode of replying is defective, the plaintiff should have replied, that the defendant did not prosecute his appeal with effect, whereby he had sustained damage to such an amount. By this mode of replying, the plaintiff below would have assigned a breach in the nonperformance of an act which the defendant below had stipulated to perform, and under the allegation, that the plaintiff had sustained damages to such an amount, the plaintiff might have shown that the goods were not returned. And the court cannot but remark, that the pleadings, subsequent to the replication, are incorrect. It is an established rule in pleading, that if a plea, avowry or replication, each of which is entire, be bad in part, it is bad for the whole. *Manchester vs. Vale*, 1 *Saunders*, 28, (note 2.) *Trueman vs. Haist*, 1 *Term. Rep.* 40. 1 *Chitty's Plead.* 644, 523, 524. Hence, it necessarily results, that a plea of tender cannot be rejoined to part of a replication, and a demurrer filed to the residue; and if the law was otherwise, the plea of tender, as rejoined in this case, would be badly pleaded. First, because the debt or duty continuing, the tender should be pleaded with a *proferri in curia*; 6 *Bacon's Abridgment*, tit. *Tender*, (H 4;) and secondly, because the rejoinder concludes in bar to the action, instead of praying judgment whether the plaintiff ought to recover any damages, by reason of the nonpayment of the sum alleged to have been tendered. See 2 *Chitty's Plead.* 433, 468. 1 *Tidd's Practice*, 621.

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DAY *et al.* vs. LYON.

APPEAL from *Baltimore* county court. *Assumpsit* by the plaintiffs, (now appellants,) on a promissory note, drawn by *Latimer* and *Lyon* in favour of the defendant, and by him endorsed in blank. Evidence was given as to the manner in which notice of nonpayment was given to the defendant; but as the decision of this court relates only to the blank endorsement, such evidence is omitted. On the defendant's prayer, which was a general one, the county court, [*Hanson*, A. J.] directed the jury, that the plaintiffs were not entitled to recover. The plaintiffs excepted and appealed, the verdict and judgment being against them. The cause was submitted without argument. BUCHANAN, EARLE, MARTIN, and DORSEY, J. on the bench.

In an action on a promissory note against the endorser, the plaintiff cannot recover without proving that the payer made the note payable to the payee, that it was endorsed to the plaintiff, that a demand of payment was made of the payer on the day on which the note became due, and that due notice of the nonpayment was given to the endorser.

An endorsee cannot maintain an action on a promissory note payable to order, unless the endorsement is filled up at the time the note is offered in evidence.

Wirt, (Attorney General of the U. S.) for the Appellants.

Heath, for the Appellee.

The opinion of the court was delivered by

DORSEY, J. We concur in the opinion given by the court below. The plaintiffs sued as endorsees of a promissory note given by *Latimer* and *Lyon* to the defendant, and by him endorsed. The plaintiffs could not have sustained their suit, without proving that *Latimer* and *Lyon* made a note payable to the defendant, that the same was endorsed to the plaintiffs, that a demand of payment was made of the payers on the day on which the note became due, and that due notice of the nonpayment had been given to the defendant. If the proof was defective in any of those particulars, the county court were correct on the general prayer of the defendant, in giving their direction to the jury, that the plaintiffs were not entitled to recover.

The plaintiff did not deduce a regular title to the note; true it is, that the defendant, by endorsing the note in blank, conferred an authority on the plaintiffs to fill up the endorsement, but he omitted to do it, and it was decided by this court, in the case of *Ringgold vs. Tyson*, at December term 1810, and in *Hudson vs. Goodwin*, 5 *Harr. & Johns*. 115, that an endorsee could not maintain an action on a note payable to order, unless the endorsement was filled up at the time it was offered in evidence. As this point is decisive against the plaintiffs, it is unnecessary to

inquire whether the facts stated in the bill of exceptions did, in point of law, amount to due notice of the dishonour of the note.

JUDGMENT AFFIRMED.

CONNELLY vs. BOWIE.

APPEAL from *Montgomery* county court. Trespass *quare clausum fregit*. The general issue was pleaded; and at the trial, the plaintiff, (now appellee,) offered in evidence the plots and explanations returned to the court, and the patent of the tract of land called *Hermitage*, (on which the trespass is alleged to have been committed,) granted to *William Joseph* on the 6th of June 1689, for 3866 acres. The third course of this grant is described, "thence south south west fifty perches to a bounded red oak by another small run." He then offered in evidence a deed from *Benjamin Harris* to *John Bowie, junr.* dated the 14th of November 1748, for a tract called *Harris's Adventure Enlarged*, being part of a tract called *Hermitage*, and described as "beginning at the end of 100 perches on the third line of a tract or parcel of land now in possession of *Benjamin Perry*, called *Hermitage*, and running thence S 32°. E 130 ps. then N 71½°. E 156 ps. then," &c. containing 405½ acres. He also gave in evidence a deed from *Thomas Boteler*, of *Prince-George's* county, to *Benjamin Perry*, of the same county, dated the 14th of July 1738, for 200 acres of land, being part of a tract called *Hermitage*, and described by courses and distances. This deed was thus acknowledged: "Memorandum. On the day and year within written, came the within named *Thomas Boteler*, and acknowledged the within land and premises to be the right of the within named *Benjamin Perry*, his heirs and assigns, for ever.

"*John Beall*,

"*Turner Wootton*."

This deed was recorded amongst the land records of *Prince-George's* county on the 8th of July 1738, (*Montgomery* county not having been erected into a county until the year 1776,) and was located by the plaintiff on the plots. To the reading of these deeds the defendant objected; but the court, [*Ridgely* and *Kilgour*, A. J.] overruled the objection, and permitted them to be read in

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Where part of a tract of land called *H* is conveyed, and calls to begin at the end of 100 perches on the third line of *H*, as owned by *P*, and the third line of *H* is described in the grant, "S. S. W. 50 perches to a bounded red oak."—Whether the parties intended that the beginning should commence at the end of 100 perches of the third line of that part of the tract which was owned by *P*, or at some other point, is a question of fact for the jury.

Where the official character of the persons before whom the acknowledgment of a deed for land executed in 1738, does not appear on the face of the acknowledgment, and it is equally silent as to the county in which it was taken, and there is no evidence to warrant the presumption that the original deed was acknowledged in conformity to the provisions of the act of 1718, ch 47, a copy cannot per se be read in evidence.

No official copy of a deed, or other instrument of writing, is per se evidence, except the original is required to be recorded.

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evidence; the defendant excepted, and appealed, the verdict and judgment being for the plaintiff.

The cause was argued before CHASE, Ch. J. BUCHANAN, EARLE, MARTIN, DORSEY, and STEPHEN, J. by

T. B. Dorsey, (Attorney-General,) for the Appellant, and by

Magruder, for the Appellee.

The opinion of the court was delivered by

DORSEY, J. This was an action of trespass *quare clauum fregit*, brought in Montgomery county court, by *John Bowie*, the appellee, against *John Connolly*, the intestate of the appellant. The general issue was joined, and defence on warrant taken. The plaintiff below located, on plots filed in the cause, a tract of land called *The Hermitage*, granted to *William Joseph* on the 6th of June 1689, for 5866 acres. He also located a deed executed on the 14th of November 1743, by *Benjamin Harris* to *John Bowie*, for a tract of land called *Harris's Adventure Enlarged*, being part of a tract of land called *The Hermitage*, and he made a location of a deed said to be executed on the 4th of July 1738, by *Thomas Boteler* to *Benjamin Perry*, for 200 acres of land, part of *The Hermitage*. The defendant counterlocated the tract of land called *The Hermitage*, as also the deed from *Harris* to *Bowie* for *Harris's Adventure Enlarged*. The plaintiff at the trial gave in evidence the grant of *The Hermitage*, and the plots and explanations, and offered to read to the court and jury the deed executed by *Harris* to *Bowie*, for *Harris's Adventure Enlarged*, as also the copy of a deed purporting to be executed on the 4th of July 1738, by *Thomas Boteler* to *Benjamin Perry*, for 200 acres, part of *The Hermitage*, and certified under the hand and official seal of the clerk of *Prince George's* county court, to be truly copied from the land records of that county. The defendant, by his counsel, objected to these papers being read to the jury. but the court below declared they were admissible evidence in the cause, and they were accordingly read. To this opinion the defendant excepted. And this court are of opinion, that the deed executed by *Harris* to *Bowie* was correctly admitted in evidence, but that the paper, purporting to be the copy of a deed from *Boteler* to *Perry*,

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ought not to have been read to the jury. *First*, as to the admissibility of *Harris's* deed. It calls to begin at the end of one hundred perches on the third line of *The Hermitage*, owned by *Perry*. The third line of *The Hermitage* is thus described in the grant, "south south west fifty perches to a bounded red oak by another small run." It is most apparent that the parties to the deed could not mean to refer to a point in the third line of the whole tract as the beginning, as that line is only fifty perches long; whether they intended that the beginning should commence at the end of one hundred perches on the third line of that part of the tract which was owned by *Perry*, or at some other point, was a question of fact to be tried by the jury; and as the plaintiff had located this deed, according to its courses and distances, the court think that it was legally admissible in evidence. *Secondly*, as to the admissibility of the writing, purporting to be a copy of a deed from the records of *Prince-George's* county. The endorsement, as certified by the clerk, is in the following words: "Memorandum. That on the day and year within written came the within named *Thomas Boteler*, and acknowledged the within land and premises to be the right of the within named *Benjamin Perry*, his heirs and assigns, for ever.

John Beall,
Turner Wootton."

The official character of the persons before whom the supposed acknowledgment was taken, does not appear on the face of it, and the paper is equally silent as to the county in which the acknowledgment was taken, nor is there any proof in the record showing that *John Beall* and *Turner Wootton* were justices of the peace, or that the acknowledgment was made in the county in which the lands were then situate. This copy *per se*, cannot be read in evidence unless the original was required to be recorded. By the act of 1715, *ch. 47*, it is declared, that no manors, lands, tenements or hereditaments, shall pass from one to another, whereby an estate of inheritance or freehold, or any estate above seven years, shall be made, or take effect in any person, by reason of a deed of bargain and sale, except the same be made by writing, indented and sealed, and be acknowledged in the provincial court, or before a judge thereof, or in the county court, or before two justices

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of the same, where such manors, lands, tenements, and hereditaments do lie, and enrolled within six months after the date of such writing, indented as aforesaid." Now, as there is no evidence in this case to warrant the presumption that the original was acknowledged in conformity to the provisions of the act, a copy cannot *per se* be read as evidence, for copies are only admissible in proof when the originals are required to be recorded to give them legal efficacy. This copy must therefore be considered as unofficial, and can only be used under the same limitations and exceptions as private copies of deeds, or other instruments of writing. If the plaintiff had offered evidence that *Benjamin Perry*, and those claiming under him, had possessed and enjoyed the land under *Boteler's* title, a strong foundation would have been laid for presuming that the original deed was acknowledged in conformity to the provisions of law, but in the absence of all such proof, there is no room for healing inferences. The court are of opinion, that the judgment of the court below must be reversed, and that a *procedendo* be awarded.

JUDGMENT REVERSED.

JUNE.

CRAPSTER vs. GRIFFITH.

Where a complainant has established his right to certain negro slaves, he can by a new bill recover the value of the issue born after the first bill was filed, and not included in the former decree.

He is also entitled to the value of the services of such slaves from the time of the auditor's statement, down to the period of their actual delivery under the decree, by which his right to them is ascertained.

APPEAL from a decree of the court of chancery. The complainant (now appellant,) and his wife, had heretofore filed a bill to set aside a settlement made between the defendant and the complainant's wife, to whom the defendant had been guardian, and to have an account of the monies in his (the defendant's) hands, and to compel him to deliver certain slaves. After a statement of accounts, the chancellor set aside the settlement, and decreed the payment of a specific sum of money, and the delivery of the slaves. This decree, on appeal by the defendant, was affirmed in this court. The money was paid, and the enumerated negroes delivered in pursuance of the decree and affirmance, but the account, as audited, necessarily stopped at a period considerably before the final decree and affirmance. In the mean time the defendant had had the services of negroes from the date of the audit to the time of delivery, compensation for which was not, and could not, be included in the decree. Between the period of executing the

commission in the original case, ascertaining and identifying the negroes, and the final decree, and also between the date of the decree, and the delivery in pursuance thereof, the female slaves had children. Those born after the decree were delivered over under the decree; but those born between the execution of the commission and decree, were retained by the defendant as his property. The answer of the defendant admitted these facts, but claimed an allowance for certain monies which he ought to have been allowed on the original decree, and denied the right of the complainant to the negroes.

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KILTY, Chancellor, dismissed the bill—1. On the ground that the decree of the court of chancery, as affirmed, was conclusive, and could not be opened by either party. 2. That the negroes, born after the close of the commission, being *in esse* before the decree, ought to have been brought in by a supplemental bill, and could not be sued for by a new bill. 3. That the value of the labour of the negroes, from the time of the auditor's statement, ought not to be allowed in this suit, it being a subject proper either for the court of appeals, in the nature of an increase of damages, or interest, or for a suit on the appeal bond. From this decree the complainant appealed to this court, where the cause was argued before BUCHANAN, EARLE, MARTIN, and DORSEY, J.

T. B. Dorsey, (Attorney General,) and *Winder*, for the Appellant, referred to *Norwood vs. Norwood*, and *Hepburn vs. Sewell*, in this court. The act of 1713, *ch. 4*, and *Butcher vs. Norwood*, 1 *Harr. & Johns*. 485.

Magruder & B. Forrest, for the Appellee, cited 2 *Com. Dig.* tit. *Chancery*, (Y 7,) 323. *Shepherd vs. Titley*, 2 *Atk.* 348. *Anon.* 3 *Atk.* 809. 2 *Madd. Chan.* 408, 409. *Cooper's Plead.* 88, 89. *Hollingsworth et ux. vs. McDonald et al.* in this court at December term 1807. *Gelston vs. Codwise*, 1 *Johns. Chan. Rep.* 189.

The opinion of the court was delivered by

DORSEY, J. The chancellor's decree in this cause is erroneous, and must be reversed, as we are of opinion that the complainant is entitled to one moiety of the negroes born of *Lucy* and *Milly*, after the execution of the commission, and before the passing of the decree in the suit

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brought by the complainant, and his wife, against the present defendant, in the court of chancery, and which is referred to, and made part of, the bill filed in this cause. And we are further of opinion, that the complainant is entitled to recover the value of the labour of the negroes assigned to him, by the said decree, from the date of the auditor's statements, to wit, the 19th December 1813, to the period when the said last mentioned negroes were delivered to the complainant.

DECREE REVERSED.

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JACKSON vs. THE UNION BANK OF MARYLAND.

An agent is not answerable for negligence or inattention, where a bill of exchange was placed in his hands for collection, and he undertook to collect it, according to the usages and customs of merchants and banks, by sending it to a bank for collection, and owing to the bill having been demanded and protested for nonpayment on the fourth day after it fell due, the endorser was discharged, and the amount of the bill thereby lost.

If a foreign merchant sends goods to his consignee, with instructions to dispose of them for him to the best advantage, and the consignee sends them to auction for sale, and the auctioneer makes way with them, or sells them, and makes way with the money, and fails, the consignee is not answerable.

The refusal of the county court to strike out a judgment by default, and suffer the defendant to plead, is not a subject of appeal, and cannot be revised by the court of appeals. (note).

The county court cannot assess damages on a judgment by default, to the amount of a bill of exchange, in an action against the endorser, the declaration setting out no cause of action, but showing that the bill was not presented for payment in time, whereby the defendant was in law discharged from all liability on account of his endorsement. (note.)

APPEAL from *Baltimore* county court. This was a special action on the case, brought by the appellant against the appellees. The declaration charged the defendants below with unskilful management of the concerns of the plaintiff. It contained two counts, to both of which objections were taken; but as the court did not decide the case on those objections, it is unnecessary to set out the declaration. The general issue was pleaded; and at the trial the plaintiff gave in evidence, that being a merchant, extensively engaged in commerce in the city of *Baltimore*, he was, as such, a customer of the defendants, and was in the habit of depositing his money with them for safe keeping, and of delivering the promissory notes and bills which he held, whether payable in *Baltimore*; or elsewhere in the Atlantic commercial cities, to the defendants, to collect for him, and in case such notes and bills were not paid, they were to be returned by the defendants to him. That being the legal owner and holder of a bill of exchange for \$684 95, drawn at *Baltimore* on the 2d of November 1810, by *John Chalmers, junior*, upon *John Chalmers* of the city of *Washington*, payable six months after date to *William Hawkins*, or order, endorsed by *Hawkins* to the plaintiff; and accepted by the drawee, he delivered the same to the defendants on the 1st of May 1811, to be by them collected from *John Chalmers*, the acceptor, when the same should become due according to law; and the defendants received

the said bill of exchange for that purpose. He also gave in evidence, that the defendants did not cause any demand to be made for payment of this bill on the acceptor, until the 6th of May 1811, when the acceptor refused to pay it. That a protest was immediately made, and notice of the nonpayment by the acceptor given to the drawer and endorser, by letter dated the 6th of May 1811, which was immediately forwarded by mail. That the plaintiff then applied to *William Hawkins*, the endorser, for payment, which he also refused to make, and he then instituted suit against *Hawkins* on the bill, in *Baltimore* county court, where he obtained a judgment by default, from which judgment *Hawkins* appealed to the court of appeals, where it was reversed. The record and proceedings in that case, it was agreed should constitute a part of the present. [See that case reported at the end of this.] The plaintiff further gave in evidence, that *John Chalmers*, junior, the drawer of the bill, and *John Chalmers*, the acceptor, became insolvent about the time the bill became due, and have been regularly discharged under the insolvent laws of this state, and of the District of *Columbia*, and that the plaintiff has never received any part of the amount of the bill. The defendants then gave in evidence, that having received the bill from the plaintiff on the 1st of May 1811, for the purpose of collection, as stated in the plaintiff's evidence, they enclosed the same, on the 2d of May 1811, in a letter from their cashier, addressed to *William Whann*, the cashier of the *Bank of Columbia*, which bank was the established agent and correspondent of the defendants, for the transaction of all such business, in the city of *Washington* and *George-Town*. The letter, of the 2d of May 1811, was sent by mail, and by the regular course of the mail would reach *William Whann* in the afternoon of the 3d of May; and that *Whann* caused the demand to be made on the 6th of May 1811. They also gave in evidence, that it was the custom at that time, and constantly before, in the District of *Columbia*, for the banks there to cause a demand for payment of bills of exchange and promissory notes to be made on the fourth day after they became due, and not before. They also gave in evidence, that it is the universal custom for banks in the city of *Baltimore*, who collect for their customers notes or bills payable at a distance from *Baltimore*, to use the banks of the

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place, where the collections are to be made, as agents in making such collections. On this evidence the defendants prayed the court to direct the jury, that the plaintiff was not entitled to recover. Which direction the court, [*Dorsey*, Ch. J. *Hanson* and *Ward*, A. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, EARLE, MARTIN, and STEPHEN, J.

Winder and *Mayer*, for the Appellant, contended, that the defendants below were responsible to the plaintiff for the damage which he had sustained by reason of the delay in presenting for payment, and protesting the bill in question. They referred to *Jones on Bail*. 60. 1 *Livermore on Agency*, 338. *Sheills vs. Blackburne*, 1 *H. Blk. Rep.* 162. The plaintiffs should have cautioned the *Bank of Columbia*, their agents, of the erroneous practice of protesting bills on the fourth day after they became due. There was a want of due care in this particular. They had notice of the fact of that practice, and were put on their guard. *Burrell vs. Philips*, 1 *Gallison*, 362. *Comber vs. Anderson*, 1 *Campb* 524. 1 *Livermore*, 353. Negligence and diligence of parties is a question of law for the court. In *Hawkins vs. Jackson*, this court decided that the endorser was not liable on the very bill in question.

Taney and *Mitchell*, for the Appellees, contended, that the law would imply the usage of collecting through the banks in *Columbia*, to be known to the appellant, as he had before collected in the same way. The defendants undertook the collection of the bill without consideration, and they could not be liable but for gross negligence. *Sheills vs. Blackburne*, 1 *H. Blk. Rep.* 162. Here the same diligence was used by the defendants as they were accustomed to use in their own concerns. They referred to *Smith vs. Lascelles*, 2 *T. R.* 188, (note.)

The opinion of the court was delivered by

BUCHANAN, J. It is contended, on the part of the defendants, that the proof offered at the trial by the plaintiff, and stated in the bill of exceptions, does not correspond with the agreement set out in the declaration, and that for the variance between the *allegata* and the *probata*, the

plaintiff is not entitled to recover. It is not necessary to examine this technical objection to the plaintiff's right of recovery, there being quite enough without it to defeat the action. *John Chalmers*, on whom the bill of exchange was drawn, resided in the City of *Washington*, in the District of *Columbia*; and it is stated in the declaration, that the defendants undertook and promised to collect the amount, according to the usages and customs of merchants and banks in the city of *Baltimore*. Now what is that usage? Why it is stated in the bill of exceptions to be the universal custom of the banks in the city of *Baltimore*, that collect for their customers, (who are the merchants,) notes or bills payable at a distance from *Baltimore*, to make use of other banks as their agents in making such collections. So far, then, as respects the sending of the bill of exchange in question to a bank in the District of *Columbia* for collection, the defendants acted in strict conformity with their engagement; and having received it on the first of May 1810, and enclosed it on the day following to the cashier of the *Bank of Columbia*, their established agent for the transaction of all such business in the city of *Washington* and *George Town*, by mail, in a letter, which, according to the regular course of the mail, would reach its destination on the third day of May, two days before it became payable, according to its tenor, and the law merchant of this state. Surely no negligence or inattention is imputable to them in relation to that part of the transaction; nor is it pretended that any loss was sustained by reason of delay in sending on the bill. They sent it for collection, in convenient and reasonable time after it was received by them, to a respectable agent, an institution of high standing, and dealt with it, as it was their known and established custom to deal with all notes and bills to be collected, in the District of *Columbia*, without any imputation of unfairness in the course they pursued. But it is urged, in behalf of the plaintiff, that in consequence of the demand on the acceptor of the bill for payment, and protest for nonpayment being made on the fourth day after it fell due, he has been unable to recover against the endorser, who lives in the city of *Baltimore*, and that the defendants ought to be answerable for the negligence of the *Bank of Columbia* in not making the demand and protest on the third day of grace, according to

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the law of this state. But it appears to have been the uniform custom of all the banks within the District of *Columbia*, to cause demand and protest to be made on the fourth day, and that the *Bank of Columbia*, in this instance, pursued the settled custom. How far that custom is to be regarded as the law of the District, it is not necessary in this case to inquire. It was the universal custom of the banks in *Baltimore* to collect notes and bills for their customers, payable at a distance, by the agency of other banks. The plaintiff was a customer of the *Union Bank of Maryland*, established in *Baltimore*, made all his deposits there, and placed there for collection all his notes and bills, whether payable in *Baltimore*, or elsewhere; he was a merchant extensively engaged in commerce, and must be supposed to have had a knowledge of the uniform and established mode of making such collections by the banks, and particularly the *Union Bank of Maryland*, in which he did all his business of that character. This bill of exchange was payable in the District of *Columbia*, and the placing it with the defendants for collection was equivalent to an agreement that it should be sent by them for that purpose to some bank in the District of *Columbia*, to the *Bank of Columbia*, their established agent, thus virtually constituting the *Bank of Columbia* his agent in that transaction, and if that agent did, in conformity with the custom in the District of *Columbia*, neglect to cause demand and protest to be made on the proper day, the defendants are not chargeable with any negligence, or other improper conduct. If they are to be presumed acquainted with the custom of the banks in the District, the same may be predicated of the plaintiff, and that he placed his bill with them for collection, according to that custom, as it was their practice to do, in relation to all other notes and bills payable there. This transaction is not affected by the general law of bailment, except so far as concerns the transmitting of the bill to the *Bank of Columbia*; and if it had not been transmitted in due time, the defendants would be answerable for any loss sustained by reason of such negligence. But the bill was sent on, in good time, and no negligence is chargeable to the defendants. Suppose a foreign merchant sends goods to his consignee in *Baltimore*, with instructions to dispose of them for him to the best advantage, the consignee sends

them to auction for sale, and the auctioneer makes way with the goods, or sells them and makes way with the money, and fails—In such a case, (to which this in principle may be aptly likened,) the consignee would clearly not be answerable.

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JUDGMENT AFFIRMED. (a).

(a) *HAWKINS vs. JACKSON*, referred to in the preceding case, was in this court at June term 1816, on an appeal from *Baltimore* county court. It was an action of *assumpsit*, brought by the appellee against the appellant as the endorser of an inland bill of exchange. The declaration contained only one count, which stated that the bill was dated on the 2d of November 1810, drawn at *Baltimore* by *John Chalmers, jun or*, upon *John Chalmers, senior*, at *Washington*, in the district of *Columbia*, requiring him, six months after date, to pay to the defendant, or order, \$684. 95, which bill was accepted by *John Chalmers, senior*, and endorsed by the defendant to the plaintiff. That it was on the 6th of May 1811, presented to *John Chalmers, senior*, at *Washington*, in the district of *Columbia*, to wit, at the county aforesaid, for payment, and he was then requested to pay, &c. but that he then and there, at *Washington*, in, &c. to wit, at, &c. wholly failed, and made default, whereof the defendant had notice; and thereby and by reason thereof, and of the several other premises, and by force of the custom and law of merchants, the defendant became liable to pay to the plaintiff, and being so liable he promised, &c. At the return day of the writ, March term 1812, the defendant appeared in proper person, and gave special bail, and a rule was then laid on him to plead by October term following, at which term the rule was extended to March term 1813, when the defendant having failed to plead, the court assessed the plaintiff's damages to \$702 27, and entered judgment for the damages laid in the declaration, and costs; to be released on payment of the above sum, with interest thereon from the 23d of April 1813, and costs. Afterwards, and during the same term, the defendant appeared in court by counsel, and with the leave of the court filed an affidavit, stating that he had spoken to *Luther Martin*, esquire, one of the attorneys of the court, to appear for him and defend the action, soon after it was instituted, who promised to do so; and that he had no information to the contrary, until he was informed that judgment was rendered against him. That he had been informed that the suit could not be maintained against him, because the bill of exchange had not been protested in due time, and that no demand was made on the acceptor of the bill in due and proper time after it became due. That he had no knowledge of the nonpayment of the bill, until a week or ten days after it became due, and then it was mentioned to him by a gentleman in *Baltimore*. The plaintiff then filed in court his statement of the transactions between the drawer, endorser and acceptor, and himself, relative to the drawing, accepting and endorsing the bill; and he also filed in court the bill, and the protest thereof made on the 6th of May 1811. The defendant then prayed the court to order the judgment to be stricken out, and that the defendant be permitted to plead *non assumpsit*, and he offered to proceed to the trial of the action at the present term without delay, or to continue the action until the next term, if desired by the plaintiff. But the court, [Bland, A J] was of opinion, that the judgment ought not to be struck out, and refused the defendant's prayer. The defendant excepted, and appealed to this court.

The refusal of the county court to strike out a judgment entered by default, and suffer the defendant to plead, is not a subject of appeal, and cannot be revised by the court of appeals.

The county court cannot assess damages on a judgment by default, in an action against the endorser of a bill of exchange, where the declaration does not set out a cause of action, but shows that the bill was not presented for payment in time, whereby the defendant was in law discharged from all liability on account of his endorsement.

The cause was argued at this term, (June 1816,) before BUCHANAN, NICHOLSON, EARLE, JOHNSON, and MARTIN, J.

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Martin, for the appellant, 1. As the judgment was entered by default for want of a plea, on the application of the defendant, and showing merits, it ought to have been stricken out. 2. Instead of awarding an inquiry of damages, the court assessed the damages on the bill of exchange, when there was no act of assembly authorising them to do so. 3. The declaration was on a bill of exchange, dated the 2d of November 1810, payable at the end of six months, and it was not protested until the 6th of May 1811, which was not in due and legal time.

On the first point, he referred to *Briscoe vs Ward*, 1 Harr. & Johns 165. *Cavil vs. Burnesford*, 1 Burr. 568 1 Sellon's Pr. 346.

On the second point, to 7 Vin. Ab. 315, pl. 6, 7, 8. 2 Lill Pr. Reg. 67. *Vent* 317 2 Show. 86. 1 Rich. Pr. C. P. 223. 2 Barnes, 192. *Messin vs. Massareene*, 4 T. R. 492. 1 Sellon's Pr. 347. *Chitty on Bills*, 101, 102 Act of 1785, ch. 38.

On the third point, to *Chitty on Bills*, 138, 143. *Philips vs. McCurdy*, 1 Harr. & Johns. 187. *Chase vs. Taylor*, in this court at December term 1815.

W. Dorsey, for the Appellee. 1. The refusal of the court below to allow a plea to be amended, or to grant a new trial, or to continue a cause, is not to be assigned for error; and there is no difference in refusing to permit the defendant to amend his plea, and refusing him to put in a plea and strike out the judgment. He referred to *The Marine Insurance Company of Alexandria vs Hodgson*, 6 Cranch, 266 *Greene vs. Hearne*, 3 T. R. 302 2. Suffering judgment to go by default was an admission of the contract declared on. He referred to *East India Company vs. Glover*, 1 Stra. 612. *Tidd's Pr.* 523 *Bevis vs Lindsell*, 2 Stra. 1149 *Barnes*, 223, 234. *Anonymous*, 3 Wils. 155. *Thellusson vs. Fletcher*, 1 Doug. 316. *Longman vs. Fenn*, 1 H. Blk Rep. 541. The court might assess damages on a promissory note, or bill of exchange, without a writ of inquiry; he referred to *Tidd's Pr.* 514. *Shepherd vs. Carter*, 4 T. R. 275. *Rashleigh vs. Salmon*, 1 H. Blk Rep 252 *Andrews vs Blake*, *Ibid* 5-9. *Longman vs. Fenn*, *Ibid* 541. *Thellusson vs. Fletcher*, 1 Doug. 316. *Messin vs Massareene*, 4 T. R. 493. *Goldsmid vs Taite*, 2 Bos & Pull 55 *Berthen vs. Street*, 8 T. R. 326. *Netson vs. Sheridan*, *Ibid* 395. *Brom vs. Johnson*, *Ibid* 410. *Osborne vs. Noard*, *Ibid*. 648, and *Sellon's Pr.* 347.

BUCHANAN, J. delivered the opinion of the court. The refusal, by the court below, to strike out the judgment by default, and suffer the defendant to plead, is not a subject of appeal, and cannot be revised by this court. But that court did wrong in assigning damages to the amount of the bill of exchange, the declaration setting out no cause of action, but showing that the bill of exchange, on which the suit was brought, was not presented for payment in time, whereby the defendant was in law discharged from any liability on account of his endorsement.

JUDGMENT REVERSED.

CORSE vs. PATTERSON.

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APPEAL from *Kent* county court. The cause was argued before BUCHANAN, EARLE, and MARTIN, J. by

Carmichael and *Chambers*, for the Appellant, and by
Gale and *Tilghman*, for the Appellee.

BUCHANAN, J. delivered the opinion of the court, in which the facts are sufficiently stated. This is an appeal from the judgment of the court of *Kent* county, in an action of replevin brought by *Henry Patterson*, (the appellee,) against *James Corse*, (the appellant,) for two negro boys. At the trial of which, upon issues joined on the two pleas of *non cepit*, and property in the defendant, two bills of exceptions were taken on the part of the defendant.

It appears from the facts stated in the *first* bill of exceptions, that the two negro boys were born the property of the plaintiff, and continued in his possession until the year 1818. That the defendant, from whose possession, they were replevied, claimed and held them in virtue of a bill of sale to him, in nature of a mortgage, from *James Nowland*, dated the sixth of December in the year 1820; and that for the purpose of showing a subsisting title in *James Nowland*, at the time the bill of sale was given, *Henrietta Nowland*, the wife of *James Nowland*, was offered as a witness to prove that the plaintiff sold them to her in the year 1818, before she intermarried, as it appears, with *James Nowland*, which was objected to on the part of the plaintiff, and rejected by the court; and the question is, whether that testimony of *Henrietta Nowland* ought to have been admitted?

It is a settled rule, that neither a husband nor wife can be received as a witness in a civil suit to which the other is a party. They are not competent witnesses against each other, because that would be contrary to the policy of marriage; nor in favour of each other, because their interests are the same. It is also a general rule, that neither a husband nor wife is a competent witness in an action between third persons, directly affecting the interest of the other, to which the cases of *Williams vs. Johnson*, 1 *Strange*, 504,

Neither a husband nor wife is a competent witness in a civil suit to which either is a party, nor in an action between third persons, directly affecting the interest of either.

In an action of replevin brought by P, against C, to recover two slaves held by C. under a bill of sale, in the nature of a mortgage, from N, the wife of N is not a competent witness to prove title in N, at the time of the execution of such bill of sale.

Where P. contracted with N for the sale of certain slaves, and N was to take them into his possession, and pay for them at an ensuing day, but the property of P was to continue until they were paid for, and a part of the price agreed upon was paid to P—Held, that P did not, at the time of the contract, part with his interest in the slaves; that the payment of the whole of the stipulated price was a condition precedent, on the performance of which alone, and not before, the title could vest in N. That the part payment was not such a performance as could of itself have the effect to divest P of his property, but that the title remained in him notwithstanding any indulgences which he may have extended to N. And although he might permit the possession to remain in N, he was under no obligation to stand by and suffer N to transfer them to another person, and thereby incur the risk of losing them altogether, but had a right to assert his claim whenever he saw them passing into other hands, on the ground that the title by the terms of the original contract was never out of him.

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and *Baring vs. Reeder*, 1 *Hen. & Munf.* 154, cited in argument, are by no means opposed. The first was an action against the daughter's husband, for her wedding clothes, in which her mother was admitted to prove that they were delivered, not on the credit of the daughter, but of her father, the husband of the witness, on the ground, that though the testimony went to exempt the defendant in the action from the payment of a debt which was due by her husband, yet it did not fix the debt upon the husband; as neither her testimony, nor the credit founded upon it, could ever have been given in evidence against him in an action brought for the same debt, which could only have been sustained upon other evidence. The only operative effect, therefore, of her testimony, was to exempt the immediate defendant from being charged with a debt which was due from another. And the latter, *Baring vs. Reeder*, was decided on the same principle, with the additional ground, that the interest of the husband in that case was equally balanced between the parties; and consequently could not be affected by the testimony of his wife; and neither of these cases has any bearing upon this; it is indeed an action between third persons, but directly affecting the interest of *James Nowland*, on which the fact attempted to be proved by his wife would have an immediate operation in his favour. If the plaintiff, *Henry Patterson*, never parted with his interest in the negroes in question, he has a right to recover them, and *James Nowland* can have no benefit of the right to redeem under the terms of the bill of sale to *Corse*, the defendant; but if, on the contrary, the plaintiff did sell them to *Nowland's* wife, before he intermarried with her, *Nowland*, by his marriage, acquired a right to dispose of them, and has a subsisting interest in the right to redeem, which is increasing in proportion as the negroes, (who are still very young,) increase in value. He of consequence is directly interested to the full amount of the value of the right to redeem, be that what it may, in defeating the plaintiff's action, since upon the plaintiff's recovery or not depends his deriving any benefit of the right to redeem. On the ground of interest, therefore, his wife was not a competent witness to prove a sale of the negroes by the plaintiff to her when sole, and thus to defeat the action, by which event her husband would be immediately benefitted, and her testimony was properly rejected.

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It appears, however, by the *second* bill of exceptions, on the testimony of other witnesses, that sometime in the spring of the year 1818, a contract for the sale of the negroes in question was entered into between the plaintiff and *Henrietta Briscoe*, before her intermarriage with *James Nowland*, by which it was stipulated, that she should take them into her possession, to be paid for, at a price agreed upon, in the course of the fall of the same year, but that they should remain *his property* until they were paid for. Evidence was also offered to prove the admission of the plaintiff, that he had received a part of the price agreed upon, but without showing how much. On that evidence, in connexion with the testimony contained in the first bill of exceptions, a motion was made to the court below to direct the jury to find for the defendant, if they should believe that the plaintiff had received a part of the money stipulated to be paid, which direction the court refused to give; and the question here is, whether upon the whole case, (admitting no other agreement to have been entered into, but that the sum paid was received under the contract as stated,) the plaintiff is entitled to recover? Which seems to lie in a narrow compass.

The plaintiff did not, at the time of the contract, part with his interest in the negroes, but by the express terms of it they were to remain his property until they were paid for, which was to have been in the course of the next ensuing fall. The payment of the whole of the stipulated price was a condition precedent, on the performance of which alone, and not before, could the title have vested in *Henrietta Briscoe*. That condition no where appears to have been performed. It is not shown that the stipulated price was paid within the time agreed upon, or at any other time, and the payment of a part was not such a performance as could of itself have the effect to divest the plaintiff of his property in the negroes, but the title remained in him notwithstanding any indulgencies which he may have extended to the other contracting party; and, being in him, neither *Henrietta Briscoe*, before her marriage, nor *James Nowland*, her husband, since, could sell them to any body else; and though he might permit the possession to remain in *Nowland*, he was under no obligation to stand by and suffer him to transfer them to the defendant, or to any other person, and thereby incur the risk of losing them al-

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together, but had a right to assert his claim whenever he saw them passing into other hands; not on the ground of rescinding the contract, which it has been contended he could not do after the receipt of a part of the purchase money, and the length of time that had elapsed before the issuing of the writ of replevin, but on the ground, that the title, by the terms of the original contract, was never out of him—the condition precedent never having been performed, and the receipt of a part of the sum agreed upon not having the effect to operate a divesture of it, in the absence of any other contract or agreement between the parties.

We concur, therefore, in opinion with the court below, on each exception, and affirm the judgment with costs.

JUDGMENT AFFIRMED.

JUNE (E. S.)

STEVENS vs. RICHARDSON.

Under the act of 1786, ch. 45, to direct descents, an election by the husband in right of his wife to take her ancestor's land at the valuation of the commissioners, and his executing bonds to the other heirs for the payment of their respective proportions, vests in him an estate in fee in the whole land elected to be taken, and does not pass any interest whatsoever therein to his wife.

Every election, under the acts to direct descents, to take the whole estate of the ancestor at a valuation, and to pay the other heirs their just proportions of the value in money, and passing bonds therefor, settles in the person electing without a deed from the commissioners, the legal estate in fee in the lands elected to be taken; and there

is no difference between an election by a child of the intestate, and an election by a husband in right of his wife, who was a child of the intestate.

In either case the electing party takes as a purchaser, and does not derive his title by descent from the ancestor.

Such an election by a husband in right of his wife, and his giving bonds as before stated, entitles his second wife to dower in the lands elected to be taken.

APPEAL from Worcester county court. An action of dower was brought by the appellant, the demandant in the court below, against the appellee, and the following statement submitted to the court for their opinion. *George Richardson* died in the year 1802, seized of the lands and mills mentioned in the demandant's declaration, without making a will, or disposing of them, and leaving the following children, *Betsey, David, Emma, Samuel, Molly* and *Nancy*. A petition was filed in the county court, at May term 1809, for a division of the said lands under the act of 1786, ch. 45, to direct descents, and the several supplements thereto. Commissioners were appointed by the court, who made their return that said lands and mills would not admit of division, which return was confirmed by the court. *John Stevens* intermarried with *Betsey*, one of the daughters of the said *George Richardson*, who was the eldest child, entitled to take at the valuation. *John Stevens*, his wife being in full life, came into court and elected, in right of his wife, to take the said lands and mills at their valuation, and to pay to the other heirs

their proportion of the valuation money. The respective portions of the valuation were regularly secured to be paid, according to law, by bonds given to the heirs severally. All which bonds have been since paid off except one. Afterwards *Betsey*, the wife of *John Stevens*, died in the year 1810, and after her death in the year 1813, *John Stevens* intermarried with the demandant. *John Stevens* died in 1814, in the possession of said lands and mills, and without receiving a deed for them from the commissioners, leaving the demandant his widow. The question submitted to the court on these facts was, whether *John Stevens* was seized of such an estate during his intermarriage with the demandant as to entitle her to dower? The county court, [*Martin*, Ch. J. and *Robins*, A. J.] gave the following opinion: This case involves many questions, and some of considerable difficulty. It has been asked, could *John Stevens* elect at all in right of his wife? If so, does his election invest the wife with a title in her own share, and himself with the residue? Or does it invest her with a title not only in her dividend but in the whole estate, he acting merely as her representative? Or does he, by his election, become the purchaser of the whole estate, and divest the wife with other heirs altogether of the inheritance? It is in vain we seek for a case analagous in the *English* law; it is a case *sui generis*, and must depend on the construction of the acts of assembly regulating the descent of landed property in this state. The original act of 1786 is silent, as to the husband's electing to take in right of his wife; and it is only by a liberal construction of that act that it is in any way admissible. But we find the practice of his exercising this right has prevailed at a very early period after the passage of the first law, and has been recognized by an act of the legislature as early as 1802, as a subsisting right. To deny it, therefore, at this time, would shake the title of much of the landed property in the country, and be productive of great inconvenience. We feel bound to support it. If then he has this right, in what capacity does he come in? Is he merely the representative of the wife, and electing for her as the party entitled to take as heir? Does he invest her with the whole inheritance? Or does he invest her with a fee in her own dividend only, and become the purchaser himself of the residue? It is certainly contrary to

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the policy of that law, from whence we derive our notions of *descent*, to admit any person to come into the inheritance except those of the blood of the ancestor; and by that law the husband would be considered a stranger, and entitled to no rights as heir, but that derived from the *feme covert* heiress, as her baron; and at first view we would be led to suppose the election of the husband would invest the wife with the whole estate. But from the whole scope of our descent laws, the right of election is personal, and has no respect to what is deemed, in the *English* law, proximity of blood, except in a few instances. The manifest intent of the act of 1786, when an application is made for a division of an estate, is to render an estate held in common, one in severalty; either by a division, when it is susceptible of it, or by an election, or by a sale of the whole. If the husband's election could invest the wife with a title in her dividend only, and make him the purchaser of the residue, it would defeat the object of the act altogether, in facilitating the division of the intestate's estate. A division, made with the effect contemplated, would last only during the coverture. The husband then could not by his election invest the wife with a fee in her dividend of the estate, and become the purchaser in his own right of the residue, nor would it be less reasonable to suppose that the husband's election should invest the wife with the whole inheritance. Suppose the wife's share only one tenth, would any reasonable construction of the acts of assembly admit, that after the husband had paid the value of nine-tenths of the estate the whole would devolve upon the wife, in fee, in exclusion of his own descendants? Yet this case might frequently occur. The first of those positions is so repugnant to the spirit and scope of the acts of assembly on this subject, and the latter so unreasonable, not to say unjust, and the practice under those acts has been uniformly so different, that the court must reject them as totally inadmissible. And we are led to the necessary inference, that the husband, on his election, must take the whole estate as a purchaser. And this involves another question, all important in the discussion of this case, viz. With what kind of an estate was *John Stevens* invested? Has he (by the mere act of electing,) the whole freehold? Or had he only an equitable interest to be consummated by paying the purchase money and obtaining a deed from the com-

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missioners? To entitle the wife to dower, a freehold estate in the husband, during the coverture, is indispensable. It is contended, on the part of the plaintiff, that the mere act of election vests in the husband such an estate, and that it has an operation similar to that of a surrender, or a sheriff's sale of lands. The court, after the most mature deliberation they have been able to give this subject, cannot view it in this light. It is true the act of 1786 requires no deed to the heir electing to take; nor are we aware that it is necessary (under any of the acts,) for a party claiming by descent. The whole estate devolves upon all the heirs at law of an intestate, subject to be defeated by an election of one in exclusion of the other heirs. And all the acts of assembly relative to descents, seem to draw a distinction between a person coming in by descent, and a purchaser. In the first no deed seems necessary, in the latter it is indispensable; and by the act of 1802, though it speaks retrospectively, a deed seems to be called for in this very case. It would be attended with great inconvenience if the doctrine was once established; that a purchaser under a commission, or a husband electing in right of his wife, could by parole evidence show a transfer of the freehold. It would be a departure from that precision our law has for ages required in the transmission of real property. We deem it a correct position, that a husband, electing in right of his wife, comes in as a purchaser, and as such cannot be invested with any other than an equitable interest until a deed is ordered by the court, and executed by the commissioners. This case differs materially from the case of *Messex* and *Bloodworth*, decided in *Somerset*. There the husband elected to take the estate as eldest son and heir. There no deed was necessary to consummate the title and seizin of the husband, but here it is indispensable. Upon the whole view of the case, the court are of opinion, that *John Stevens* had only an equitable interest in this estate, and had not such a seizin as would enable his widow to claim her dower. Judgment was therefore entered for the defendant, and the demandant appealed to this court.

The cause was argued before BUCHANAN, EARLE, and STEPHEN, J. by

Wilson, for the Appellant.

No counsel appeared for the appellee.

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EARLE, J. delivered the opinion of the court. This is an action of dower, and we are called on by the case to give a construction to the acts of assembly regulating the law of descents. A decision of any question arising on those acts of the legislature, deeply concerns the landed interest of the country, and is, in every view, of much importance. The one under consideration is peculiarly of this character. We have to decide upon the legal effect of an election made by a husband, in right of his wife, to take the whole estate of her ancestor at the valuation set upon it by the commissioners, and pay to her brothers and sisters their just proportions of the value thereof in money; to determine in fact, whether such election vests in the husband the inheritance in fee in the lands elected to be taken, to the exclusion of his wife; and if it does so vest, whether he is thereby clothed with the legal estate, or only acquires therein an equitable interest to be perfected by the payment of the purchase money, and a conveyance by deed from the commissioners.

These points are raised in a suit by the second wife of *John Stevens*, who elected to take the lands and mills, set forth in her declaration, in right of his former wife. He died in the year 1814, possessed of those lands and mills, but without any other title to them than what he derived by election to take them in right of his first wife, not having fully paid the purchase money, nor obtained a deed for them from the commissioners.

Whether the husband is capable, by his election in right of his wife, to vest the inheritance in fee in the lands elected to be taken in himself, to the exclusion of his wife, is a question on which we cannot at this time permit ourselves to doubt, whatever might have been our sentiments on the point, if we had been invited to act upon it soon after the first act of descents in 1786. The capacity in the husband to do this has been fully recognized by the legislature of the state, by an act passed in the year 1802; and it is believed, that in numberless cases, before and since that law, the courts of justice have every where sanctioned the principle, that the election by the husband, in right of his wife, to take her ancestor's lands at the valuation of the commissioners, vests in him an estate therein in fee. Considering that it would be of serious moment to the community to cast a shade of doubt on this doctrine,

at this late period, this court must decide, that such an election by the husband, in right of his wife, to take the lands of her ancestor, according to their value as ascertained by the commissioners, followed up by his passing bonds to the other heirs for the payment of their just proportions of the value thereof in money, agreeably to the acts of assembly on this subject, vests in him an estate in fee, in the whole land elected to be taken, and does not pass any interest whatsoever therein to his wife.

The further question to be inquired into is, whether the *legal title* to the land, elected to be taken, vests in the husband by the election, or only an *equitable interest*, to become a legal estate on the payment of the purchase money, and obtaining a deed from the commissioners? We hold that every election, under the acts of descents, to take the whole estate of the ancestor at a valuation, and to pay the other heirs their just proportions of the value in money, and passing bonds for the same, settles in the person electing the legal estate in fee in the lands elected by him to be taken; and in this respect we cannot perceive any difference between an election by a child of the intestate, and an election by a husband in right of his wife, who was a child of the intestate. In either case, the electing party takes with his own free consent, and by his own act, as a purchaser, and does not, as was suggested, derive his title by descent from the ancestor; and in both cases, the whole proceedings, from the petition to the election, become like a matter of record, which to future times may test their legal correctness. An election by the child or heir of the intestate has always been thought to pass the legal estate in fee, for it was not until the year 1820, that the legislature empowered the commissioners to convey to him. As to a husband electing in right of his wife, it is true the commissioners were authorised to convey to him the land, elected to be taken, at an earlier period.

The act of 1802, *ch. 94, section 6*, was enacted for this purpose, but it is to be observed, that this act has in this respect only a retrospective operation, and from that time, until the year 1820, the commissioners acting under the descent laws, had no power to make any such conveyance to a husband.

The court then must entertain the opinion, that the election of *John Stevens*, in right of his first wife, to take the

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lands in question, vested in him, under the circumstances in which it was made, the legal estate in fee in the lands and mills mentioned in the plaintiff's declaration, and that she is entitled to dower in the same. The judgment must be reversed, and a *procedendo* awarded.

JUDGMENT REVERSED, &c.

JUNE (E. S.)

SEEGAR'S EX'RS. vs. THE STATE use of BETTON.

A having intermarried with B, who was the administratrix of C, the personal estate of C came to his hands and possession, and upon a settlement of their administration account, a distributive share of the balance against them was due to D, to whom A was appointed guardian. In an action on A's bond as guardian, brought against his executors, he being dead—*Held*, that B, and her sureties, on the estate of C, were released from all responsibility on account of it, and A and his sureties became answerable for it on his bond as guardian; and that B, and her sureties, being thus exonerated and discharged, she was a competent and admissible witness in such action.

Where the same person, who acts as the administrator of a deceased party, is appointed guardian to the representatives, whatever balance is in his hands at the rendition of a final account, (and perhaps even prior to that time,) is in his hands and possession, not as administrator to the deceased, but as guardian to the representatives.

APPEAL from *Queen Anne's* county court. An action of debt was brought in the name of the state, for the use of *Joseph E. Betton*, on a bond executed by the appellee's testator, on the 29th of July 1810, as the guardian of *Betton*. The breaches of the condition of the bond, which were assigned in the declaration, were, that the testator, as guardian of *Betton*, did not faithfully account with the orphans court, as directed by law, for the management of the property and estate of his ward. That the intestate became possessed of real and personal estate of *Betton*, which his executors did not deliver over to him upon his arrival at age, which happened before the impetration of the original writ in this cause, but altogether refused, &c. That *Betton* was entitled to receive of the executors the sum of \$1538, which the testator received, but did not account for in his life-time; and which the executors, although often thereto required, have refused to pay over to him since the death of the testator, &c. That the testator did not discharge the duties of guardian to *Betton* according to law, and that he, in his life-time, did not, nor the executors since his death have not, delivered over to *Betton* his personal estate, according to law. The executors were ruled to answer the declaration, but they neglected to do so, and a judgment was rendered against them by default. A proceeding was therefore had in the nature of a writ of inquiry, executed at bar, to inquire of the damages and costs in the usual manner.

1. At the execution of the inquiry at bar, the plaintiff, for the purpose of ascertaining the damages, read in evidence the accounts of the testator as guardian, commencing in 1809, and ending in 1814, showing a balance due to the testator, as guardian, of £64 11 7. The plaintiff then, for the purpose of charging the defendants with *Bet-*

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ton's proportion of the personal estate of his father *Turbutt Betton*, read in evidence a certificate of the letters of administration on the estate of *T. Betton*, granted to *E. Betton* on the 13th of June 1809. Also an inventory returned by her on the said estate, amounting to \$3346 46. Also the administration accounts passed by *T. Seegar*, (the defendant's testator,) and *E* his wife, as administratrix of *T. Betton*, leaving a balance to be accounted for of \$3385 63½. The plaintiff then proved, that *T. Seegar*, the guardian, intermarried with *E. Betton* about twelve months after the death of *T. Betton*, and that the property, which was of *T. Betton* at the time of his death, remained in the possession of his widow at the time of her marriage. The plaintiff then offered to prove, by *E. Seegar*, the widow of *T. Seegar*, and the administratrix of *T. Betton*, the articles of property which came into the possession of *T. Seegar*, of the estate of *T. Betton*, at the time of the marriage, and also to prove the age of *Joseph E. Betton*, and the time he arrived at age. But the defendants objected to her being sworn, as being incompetent on account of interest. But the court, [*Earle*, Ch. J. and *Purnell*, A. J.] determined that she was a competent and admissible witness, and permitted her to be examined, being of opinion, that *T. Seegar*, being the husband of the administratrix of *T. Betton*, while he acted as guardian for *Joseph E. Betton*, was by operation of law in possession, as guardian, of the distributive share of the estate of the deceased, to which his ward, *Betton*, was entitled, and that *E. Betton*, and her sureties on the administration bond, were in like manner, by operation of law, exonerated from all liability for the amount of the distributive share, whether *T. Seegar* was, in point of fact, possessed of the said distributive share or not. The defendants excepted.

2. The plaintiff then proved by *E. Seegar*, the administratrix of *T. Betton*, that he died in March 1809, and that she intermarried with *T. Seegar*, the defendant's testator, in April 1810. That her son, *Joseph E. Betton*, arrived at age in 1819. That the property contained in the inventory, with the exception of some articles which were consumed, sold and used by her, came into the hands and possession of *T. Seegar*, at the time of his marriage. That the following property, viz. &c. amounting to \$382 79, did not come to the hands and possession of *T. Seegar*.

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The defendants then prayed the court to direct the jury, that the evidence was not sufficient to charge the defendants for the amount of *J. E. Betton's* distributive share, according to the final accounts passed by *T. Seegar* and wife; and that the defendants are only answerable for so much of the personal estate of *T. Betton* as appears, by testimony, to have come into the hands and possession of *T. Seegar* the guardian. Which direction the court refused to give. The defendants excepted. An inquisition being found for the plaintiff, and judgment rendered thereon, the defendants appealed to this court.

The cause was argued before BUCHANAN, MARTIN, and STEPHEN, J. by

Carmichael, for the Appellants, and by

Harrison, for the Appellee.

The opinion of the court was delivered by

MARTIN, J. This was an action, instituted in the name of the State, for the use of *Joseph E. Betton*, against the executors of *Thomas Seegar*, upon a guardian's bond. There was a judgment by default, and a proceeding in the nature of a writ of inquiry to be executed at bar, was ordered by the court. On the trial two bills of exceptions were taken by the counsel for the defendants. The *first*, an objection to the competency of a witness produced on the part of the plaintiff; and the *second*, upon the merits of the question then depending before the jury.

It appears from the record, that letters of administration were granted to *Elizabeth Betton*, on the estate of her deceased husband, *Turbutt Betton*, on the 15th of June 1809. That being thus the administratrix of her husband, and as such possessed of his personal estate, she some time early in the year 1810, (twelve months after the death of her first husband,) intermarried with *Thomas Seegar*. That *Thomas Seegar*, and his wife, went on to settle the estate of *Turbutt Betton*. They returned, as administrators, several accounts to the orphans court, and on the 15th of February 1816 rendered a *final* account, admitting a balance in their hands of \$3385 63½. One third of this balance, \$1128 54, *Thomas Seegar* had a right to retain as the property of his wife, leaving the sum of \$2257 09 in his hands, to be paid over to the representatives. On the

29th of July 1810, *Thomas Seegar* was appointed guardian to *Joseph E. Betton*, and entered into the bond upon which this suit has been brought.

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It is an established principle of law, that where the same person who acts as the administrator of a deceased party, is appointed guardian to the representatives, that whatever balance is in his hands at the rendition of a *final* account, (and perhaps even prior to that time,) is in his hands and possession, *not as administrator* to the deceased, but as *guardian* to the representatives. This transfer is by operation of law. The administrator having in his hands a balance that ought to be paid over to the guardian, and *one person representing both these characters*, he cannot pay the money over to *himself*, nor, if the payment was refused, is there any person who could enforce it. Under these circumstances, the law, by *implication*, considers it in the hands and possession of the party in *that representative character* that ought to receive it. *Thomas Seegar*, acting as administrator of *Turbutt Betton* in consequence of his marriage with *Elizabeth Betton* the administratrix, and admitting by his final account that he had a balance of \$2257 09 in his hands due to the representatives, and being at that time the guardian of *Joseph E. Betton*, whatever sum was due to him was, by operation of law, in the hands of *Thomas Seegar* as his guardian. The administratrix, and her securities, on the estate of *Turbutt Betton*, were completely discharged and released from all responsibility on account of it, and *Thomas Seegar*, and his securities, became answerable for it on his guardian bond.

But it has been contended, that although the general rule, that where the same person is both administrator and guardian, the balance, upon a final settlement of the deceased's estate, shall be considered in the possession of the *guardian*, is correct, the executors of *Thomas Seegar* ought not to be accountable for the whole amount of the sum stated to be due by the final account, because it is in proof that the whole property did not come to his hands and possession, but that a considerable part was wasted by the wife before her marriage with *Thomas Seegar*.

If the amount of property wasted by the wife, before her intermarriage with *Thomas Seegar*, had been more than the sum she was entitled to receive upon the settlement of *Turbutt Betton's* estate, a question might arise, which is

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not necessary to be considered in this case, as it is not brought into view by the testimony in the record. It appears from the final account on *Turbutt Betton's* estate, that the sum of \$3885 63½, was in the hands of the administratrix and her husband, to be distributed according to law. One third of this sum, \$1128 54, was due to the widow as her part of the estate. Before her marriage with *Thomas Seegar* she had wasted property to the amount of \$382 79. The amount of property thus wasted by her, would be considered *in law* as so much received by her in part payment of the sum due to her upon the settlement of the estate, and her husband, in right of his wife, would be authorised to retain *only* so much as she would have been entitled to receive had she remained sole. The sum wasted by the wife not being equal to that she was entitled to retain as the widow of *Turbutt Betton*, it clearly follows that *Thomas Seegar*, at the time he rendered his final account, was in possession of the whole amount of the sum due the representatives, after deducting the widow's thirds.

This statement disposes of both exceptions. If *Elizabeth Seegar*, and her securities on the administration bond, are by operation of law entirely released and exonerated from the debt due to *Joseph E. Betton*, we cannot see that she has any interest that would exclude her from being a witness in this cause.

The judgment of the court below is affirmed on both of the bills of exceptions.

JUDGMENT AFFIRMED.

JUNE.

THE PATAPSCO INSURANCE COMPANY vs. SMITH, et al.

If a debtor gives his promissory note on account of a pre-existing simple contract debt, the note does not merge or extinguish such debt; but the creditor, on nonpayment of the note, may resort to the original contract.

If a party at the time of contracting a debt, assigns the note of a third person to the vendor, such note does not extinguish the original contract, unless it was received as payment or satisfaction of such contract.

A applies to B for insurance for himself, and others, on a cargo of goods, and the application is accepted by B, the policy executed, and A, with P his surety, give to B their promissory note for the payment of the premium. A, at the time he applied for insurance, did not disclose, nor was he requested to do so, who the persons were for whose benefit, as well as his own, the insurance was applied for; nor were the parties interested in the insurance known as such to B, until some time after the policy had been executed. The note, when it became due, was not paid. No notice was given to C and D, who were the other persons interested in the insurance, of the non-payment of the premium, until the day the note became due. Before that time C and D paid to A their respective proportions of the premium without the knowledge or privity of B. Held, in an action of *assumpsit* for the premium, brought by B against A, C and D, that the note given by A would not *per se* be sufficient to extinguish the simple contract debt, if under the circumstances of the case the law would imply a promise on their part to pay the premium to B. But as B was satisfied with the responsibility of A, and his surety, and did not intend to look to C and D, and as it was evident that the insurance was effected by A, as the agent of C and D, and not as co-partner, B could not recover the amount of the premium in such action.

APPEAL from *Baltimore* county court. The defendants in the court below, (now appellees,) were the owners of

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the cargo of a brig called the *Ann*. The defendant, *Lyde Goodwin*, on behalf of himself and the other defendants, and by their authority, applied to the plaintiffs for insurance on said cargo on the 10th September 1816, by an application signed by himself singly, without particularizing the names of his partners in the cargo, and stating generally that he wanted insurance "for self and others." The plaintiffs thereupon executed a policy of insurance on the cargo, to amount of \$30,000. For the premium payable for this insurance, *Goodwin*, together with *George P. Stevenson*, executed a joint promissory note to the plaintiffs. Several days after the execution of the policy and of the promissory note, *Goodwin*, by a memorandum at the foot of his application for insurance, declared that he agreed to said insurance for account of himself and the other defendants in this cause. The note was executed on the 10th September 1816, and was payable on the 13th of May 1817; but was not paid. Notice of the nonpayment was, on the day when it became due, given to the co-defendants and partners of *Goodwin*, and demand was then made upon them for the amount of the premium; but neither they nor *Goodwin* paid the note, or the premium. In the month of November 1816, the said partners of *Goodwin* paid to him their respective proportions of the premium, without the privity or knowledge of the plaintiffs. The plaintiffs demand, in this suit, from the defendants, the amount of said premium. On this statement of facts the county court gave judgment for the defendants, and the plaintiffs appealed to this court.

The cause was argued at June term 1822, before CHASE, Ch. J. BUCHANAN, EARLE, and STEPHEN, J. by *Winder* and *Mayer*, for the Appellants, and by *Raymond*, for the Appellees; and was re-argued at the present term before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

Mayer, for the Appellants, contended, 1. That whether *Goodwin* be considered as an agent or as a partner of his co defendants, he and they were responsible as charged. 2. That the promissory note passed by *Goodwin* did not extinguish the responsibility of the co-defendants; and that the payment to *Goodwin*, by his co-defendants, of their respective proportions of the premium, had not exonerated them from their responsibility to the plaintiffs for the pre-

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mium. On the first point he cited 2 Leon. 110. *Waring and others vs. Favench and others*, 1 Campb. 85. *Kymer and others vs. Suwercropp*, *Ibid* 110. *Patterson vs. Gandasequi*, 15 East, 68. On the second point *Schermerhorn vs. Loines*, 7 Johns. Rep. 311. *Holmes vs. D'Camp*, 1 Johns. Rep. 34. *Kearslake vs. Morgan*, 5 T. R. 513. *Puckford vs. Maxwell*, 6 T. R. 52. *Owenson vs. Morse*, 7 T. R. 60. *Stedman vs. Gooch*, 1 Esp. Rep. 5. *Tobey vs. Barber*, 5 Johns. Rep. 68. *Markle vs. Hatfield*, 2 Johns. Rep. 455. *Clark vs. Young*, 1 Cranch, 181.

Raymond, for the Appellees, contended that it was not alleged, either in the declaration, and did not appear in the case, that the defendants were partners, and that it could not be inferred that they were. That *Goodwin* was nothing more than an agent for the other defendants who had paid the premium to him, and were therefore discharged. He cited *Marsh. on Ins.* 292, 335, and the authorities there referred to. He also contended, that where the liability was different upon the note from what it was upon the original simple contract, the note was an extinguishment of the original contract; but that where the liability was the same upon the note as upon the original contract, the note was not an extinguishment of the contract. He referred to 2 Bac. Ab. tit. Debt, (G.) 290. *Kearslake vs. Morgan*, 5 T. R. 513, 518. *Holmes vs. D'Camp*, 1 Johns. Rep. 34. *George vs. Clagett*, 7 T. R. 355; and *Patterson vs. Gandasequi*, 15 East, 62.

STEPHEN, J. delivered the opinion of the court. This action of *assumpsit* was instituted in Baltimore county court, by *The Patapsco Insurance Company* against the defendants, to recover the sum of \$1351 25, the premium stipulated to be paid for the insurance of the cargo of the *British brig Ann*, at and from *Buenos Ayres* to *Baltimore*. The application for insurance is in the following words: "*Lyde Goodwin* wants insurance for self and others on cargo pr. the *British brig Ann*, *Anderson*, master, at and from *Buenos Ayres* to *Baltimore*," &c. This application was accepted by the office, the policy executed, and on the same day *Goodwin*, with a certain *George P. Stevenson*, as his surety, (who was not in any manner interested in the subject matter of the insurance,) gave their negotiable promissory note for the payment of the premium of the

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policy of insurance to the plaintiffs. Payment of this note, on its arrival at maturity, was legally demanded, and not being paid, a protest was made by a notary public, in the usual manner, for nonpayment. It is admitted, in the case stated, that no notice was given to the defendants of the nonpayment of the note, or any demand made on them by the plaintiffs for payment of the premium of insurance, until the day the note became due. That the defendants, before the above mentioned note became due, paid to *Goodwin* their respective proportions of the premium of insurance, without the knowledge or privity of the plaintiffs. That *Goodwin*, at the time he applied to the office for insurance, did not disclose the names of the owners of the cargo of the *Ann*, and that the parties interested in the insurance, or in other words the defendants, were not known as such to the insurers, until some time after the policy had been executed. On the nonpayment of the promissory note, given for the premium of insurance, this action was instituted to recover the same from the defendants, on the ground of an *assumpsit* legally implied to pay the same; and the question which this court is called upon to decide is, whether such a suit, under the particular circumstances of the case, can be sustained upon the established principles of law? In a state, at present highly respectable for its standing in a commercial point of view, and promising, by a gradual developement of its faculties, to make still further advances in that respect at no very distant day, questions relating to the laws of trade and commerce must at all times be deemed of the highest importance. It is therefore much to be desired, that in judicially deciding upon such principles, especially in the dernier resort, the utmost accuracy should be attained, and the doctrine of the law merchant settled upon the firmest and most stable foundation. The first question, to the consideration of which the mind is forcibly drawn in this case is, what was the effect of the note given by *Goodwin* and *Stevenson* upon any legal liability which might have attached upon the defendants in the absence of such note? The law is clear, that where a debtor gives his promissory note on account of a pre-existing simple contract debt, such note does not merge or extinguish the debt due on simple contract; but that the creditor, on nonpayment of the note, may resort to the original cause of action, and sue upon it.

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This doctrine is founded upon the principle, that both causes of action are of equal dignity in the eye of the law, and, therefore, in legal construction, the one does not merge or extinguish the other. This principle is too well settled to need the aid of authority to support it. Where a party, at the time of contracting a debt, assigns the note of a third person to the vendor, such note does not extinguish the original cause of action, unless it was received as payment or satisfaction of the original contract; to this effect see the case of *Clark vs. Young*, 1 *Cranch*, 181. The principle here established goes to prove, that a promissory note executed by the debtor and a third person at the time the debt is contracted, does not wholly extinguish the simple contract or original cause of action. In this case the note passed by *Goodwin* and *Stevenson* to the insurance company was a negotiable instrument, payable to order. If the note had been passed away or endorsed by the company, the law is clear, that no action could be sustained upon the primary cause of action; but it appears, from the case stated, that at the time the note became payable, it remained in the possession of the payees, and had not, at that time, been negotiated. In support of the doctrine here stated, *Harris vs. Johnston*, 3 *Cranch*, 311, and *Holmes vs. D'Camp*, 1 *Johns. Rep.* 34, are referred to. In the last of which cases the judge says, that "technically speaking a negotiable note is not an extinguishment of an antecedent debt, yet it has been deemed an extinguishment *sub modo*." He further goes on to remark, that where a negotiable note has been given for a prior debt, the plaintiff should not be suffered to recover on the original consideration, unless he shows the note to have been lost, or produces and cancels it at the trial. As before remarked, the fact in this case is admitted to be, (at least the contrary does not appear,) that the note remained in the possession of the party at the time it was due, and of course could not afterwards be negotiated, without subjecting the party receiving it to every defence which might be set off against the person to whom it was originally payable. From these principles, and the authorities referred to in support of them, it results that the note given by *Lyde Goodwin* and *George P. Stevenson* would not *per se* be sufficient to extinguish the simple contract debt, if under the circumstances of the case the law would imply a promise on the

part of the defendants to pay the premium of insurance to the plaintiffs. The question, however, still arises, did the law imply such promise? It is admitted, that at the time *Goodwin* applied for insurance his application was made for himself and others. He did not disclose at that time, nor was he requested to do so, who those persons were for whose benefit, as well as his own, the insurance was applied for. The insurers were therefore manifestly satisfied with the responsibility of *Goodwin* and *Stevenson*, and did not intend to look to the other defendants for payment. It is most evident that the insurance was effected by *Goodwin*, as their agent, and not as copartner; and it fully appears that he was so considered by the assured themselves, because, before the premium note became due, the defendants paid to *Goodwin*, their agent, their respective proportions of the premium. In *Patterson vs. Gandasequi*, 15 East, 62, the law is clearly settled to be, that if the vendor of goods, knowing that the buyer who deals with him in his own name is in truth the agent of another, elect to give the credit to the agent, he cannot afterwards recover the value against the principal; but if the principal be not known at the time of the purchase, when discovered, he or the agent may be sued at the election of the seller. It is true that the defendants in this case were not named to the plaintiffs, but sufficient was disclosed to the insurers to apprise them that the insurance was not for the benefit of *Goodwin* alone, but for himself and others, which was sufficient to put the insurers on inquiry, if they had not been satisfied with the liability of *Goodwin* and *Stevenson* alone. *Grose*, Justice, says, "I think that the plaintiffs in this case might have elected whom they would have for their debtor; and here they seem to have made their election." The court are therefore of opinion, that there is no error in the judgment of the court below.

JUDGMENT AFFIRMED.

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THE BANK OF COLUMBIA vs. MAGRUDER'S Adm'r.

Bank of Columbia
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MagruderAPPEAL from Montgomery county court. *Assumpsit* on a promissory note, dated the 2d of February 1815, drawn

The maker of a promissory note was offered as a witness by the holder in an action against the endorser, and on his *voir dire* expressed his doubts of his interest in the event of the cause, and represented it to depend upon the question, whether the act of limitations could be pleaded to a claim he had against the endorser, in case, on a recovery against him by the plaintiff, he the witness should be sued by the endorser—*Held*, that he was not a witness, declaring himself to be interested, nor as a witness believing himself to be so.

In an action against the endorser of a promissory note, the maker has not such a direct interest in the event of the suit, as ought to exclude him from giving testimony on behalf of the plaintiff—a judgment having been had against him on the note.

Where a demand of payment of the maker of a promissory note, and notice to the endorser, were on the day after the three days of grace, in conformity to the established practice and custom of the bank, (the holders of the note)—a custom known to, and understood by, the endorser—*Held*, in an action against him on the note, that the demand was sufficient.

However defective a declaration may be in stating the demand of payment of a promissory note on the fourth day after it became due, or in omitting to state the custom so to make the demand, and of the endorser's knowledge of the custom, advantage, if there is any thing in the allegation, can only be taken of it on demurrer, or perhaps on the trial, by way of exception to the admissibility of the evidence.

When the party to be affected by notice of the nonpayment of a promissory note resides in a different place from the holder, the rule is, that the notice may be sent through the post-office to the post office nearest to the party entitled to such notice.

Where the notary, who sends the notice, has inquired as to the residence of the endorser, and the post-office at which he receives his letters, and sends the notice to such office, the court will presume that to be the nearest office to the endorser, in the absence of proof to the contrary.

by *George Magruder*, for \$300, and payable, 60 days after date, to the appellee's intestate, (the defendant in the court below,) or order, and by him endorsed to *Patrick Magruder*, or order, who endorsed it to the appellants.

1. The plaintiffs at the trial offered in evidence the note, the hands-writing of the several parties being first proved; and, for the purpose of showing that the defendant's intestate was not entitled to notice of nonpayment when the note had been demanded of the maker, and payment refused, produced and offered to prove, by *George Magruder*, the maker, that at the time the note was drawn and endorsed, the intestate was indebted to the maker in a large sum of money, which though not exactly liquidated between them, was believed by them both to be fully equal to the amount of the note, and that it was agreed between them that the note should be offered for discount at the Bank of Columbia, and the proceeds taken by the witness on account of the debt so due to him by the intestate, and that the intestate should have all the time to pay the note that the bank would allow him. It was admitted that the plaintiffs had recovered a judgment on the same note for the amount thereof, and costs of suit, against the witness, and that the judgment was still in full force and effect. The defendant contended that the witness was incompetent to give such testimony, and was interested in the event of this cause. He was, therefore, examined upon his *voir dire*, and in answer to the question, whether he was interested in the event of the suit? answered, that he did not conceive himself interested, provided the statute of limitations could not be pleaded in bar to an account which he would offer as a set-off against the defendant's claim against him, if the plaintiffs recovered in this suit for the amount of this note, and he should be hereafter sued therefor by the defendant. The court, [*Kilgour*, A. J.] was of opinion, that the witness was interested, and refused to

admit the evidence.

permit him to be sworn. The plaintiffs excepted.

2. The plaintiffs then gave in evidence the note and protest, and proved, by *Walter Smith*, that he has been a merchant in *George Town* since the year 1804, and in a counting house several years previous to that time; that about the year 1806 he was appointed a notary public; that he well recollects that, since the year 1806, and from that time up to June 1818, it was his practice, as a notary, and he believes the custom of the merchants, and of all the banks in the county of *Washington*, to demand payment of promissory notes of the makers on the day after the last day of grace, and not sooner, and in default of payment to give notice to the endorsors on the same day. That the same practice he believes prevailed before the year 1806, and as far back as he has any knowledge or remembrance of banking and commercial transactions. The only exception to this universal practice, as far as his recollection serves him, was in the case of one of the banks of *Baltimore*, which occasionally put into his hands, for protest, notes drawn by persons residing in *Washington*, and gave directions, through the bank there, in such cases, to demand payment on the third day of grace. The instruction from all other distant banks was to demand and give notice and protest according to the practice prevailing in *Washington* county. They also proved by *William Whann*, that he came to the District of *Columbia*, in the year 1792, as a merchant, and became an officer of the Bank of *Columbia* in the year 1795, and is now the cashier of said bank; that from the year 1792, up to June 1818, it was the custom of the merchants and banks in *George Town* and *Washington*, since there were commercial transactions in *Washington*, to demand payment of promissory notes of the makers thereof, on the day after the last day of grace, and in default of payment to give notice on the same day to the endorsors; that this practice prevailed in *George Town* in 1792, when the deponent first came there to reside; that the Bank of *Columbia*, since he has known it, has always pursued this practice, and so instructed the notary of the bank, and were advised to this course of proceeding by *J. T. Mason*, esquire. Since June 1818, in consequence of a decision of the Circuit Court, it has been the practice of the Bank of *Columbia* to demand payment of promissory notes of the drawers, both on the last day of

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grace, and the day after the last day of grace, and to give notice, in default of payment, on the day after the last day of grace. The plaintiffs also proved by another competent witness, *D. Kurtz*, that the note of *George Magruder*, dated the 2d of February 1815, at sixty days, in favour of *T. C. Magruder*, endorsed by him and *P. Magruder*, was discounted at the Bank of Columbia, and became due April 3d of the same year, and not being paid, it was protested according to custom, and now remains unpaid by either maker or endorser. It appears also, that the parties asked a renewal of this note on the 6th of April 1815, which the board agreed to conditionally, (by a general entry on that day, in these words: "when names are right, notes formal, and discounts paid,") from the circumstance of the notes not being regularly entered up. It is evident, that from one or other of the causes above stated, the note was protested. The note herewith exhibited is the note offered at this bank on the 6th of April 1815, marked "*Bank.*" And, with the consent of the defendant, the plaintiffs read the note in evidence. The plaintiffs also examined *Samuel Cruise*, and having produced a paper containing copies of the note of the 2d of February 1815, and the protest thereof on the 7th of April 1815, stated, that the same was his hand-writing; that at the time the same was written, and at the time of the date of said protest, he was the clerk of *Walter Smith*, the notary public, and that he recorded said protest, and that said paper is taken from his notarial book; that he made the demand and protest, and gave notice to the endorsors, as stated in the said paper below the note of *George Magruder*. The said witness further gave testimony, that from the best information which was obtained at the time of the protest, the defendant's intestate was then living near *George Town*, and it was usual to forward notices or letters to him through the *George Town* post office, addressed to him near *George Town*. The defendant then proved to the jury, that her intestate, at the time of the execution and protest of said note, resided three or four miles from *Montgomery* court-house, and about ten miles from *George Town*, and had resided in the same place or near it ever since the year 1812; that said intestate, during that time, often dealt with the merchants at *Montgomery* court-house, and was frequently there. That he

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was several years at sea before his residence at the place aforesaid, and resided in *George Town* till he was fourteen or fifteen years of age, at which time he went to sea, and after his return was often in *George Town*, where his brothers, the drawer and endorser of this note, also resided. The plaintiffs then, for the purpose of showing that the defendant's intestate had a knowledge of the customs of the banks in *George Town*, offered to prove, by a competent witness, that the defendant's intestate, before the date of this note, and sometime in 1812 or 1813, received an accommodation in the *Union Bank of George Town*, on a note drawn by himself, for \$5000, which was continued some time in that bank. The defendant then prayed the court to instruct the jury, that upon this testimony the plaintiffs were not entitled to recover; and the plaintiffs prayed the court to instruct the jury, that if they believed, from the evidence, the custom herein stated to have been as there stated, and to have been known to the defendant's intestate at the time of the endorsing of the note aforesaid, then it is competent for them to presume that the intestate consented to that custom, and agreed that the demand and notice should be conformable to such custom; and that if the jury believed from the evidence that the notary public used due diligence to ascertain where the intestate lived, and where to address the notice to him, and did address the same to him accordingly, then said notice is sufficient; and if they also believed that the demand and notice were made and given according to the custom aforesaid of the said banks, that the plaintiffs are entitled to recover. But the court, [*Ridgely and Kilgour*, A. J.] being equally divided in opinion, refused to give either of the instructions prayed. The defendant excepted to the refusal by the court to give the instruction prayed by her, and the plaintiffs excepted to the refusal by the court to give the instruction prayed by them. The verdict and judgment being for the defendant, the plaintiffs appealed to this court.

The cause was argued at June term last before BUCHANAN, EARLE, DORSEY and STEPHEN, J.

F. S. Key, for the Appellants, contended, on the first bill of exceptions, that the court below erred in determining the witness offered and sworn on the *voir dire* to be incompetent, for his answer disclosed no interest, but only

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a doubt as to his interest, and the court ought to have told him that limitations could not be pleaded to his off-set, and that therefore he was not interested. On the *second* bill of exceptions he contended, that the court ought to have refused the defendant's, and granted the plaintiffs' prayer. That the parties to a note may, by consent among themselves, dispense with the legal demand and notice usual in such cases; or modify them as they please, and that it was competent for the jury, from the evidence offered, to infer such consent, from the known usage of the banks in *George-Town* in relation to all notes discounted by them; and that due diligence having been used in this case by the notary to ascertain the residence of the defendant's intestate, and the usual notice accordingly sent to him, was sufficient. On the questions in the *second* bill of exceptions, (having stated that the common and statute law of this state was adopted in the District of *Columbia* in 1801,) he referred to *Chitty on Bills*, 252, (note.) *Jones vs. Fales*, 4 *Mass. Rep.* 245. *Widgery vs. Munroe*, 6 *Mass. Rep.* 449. *The Lincoln and Kenneback Bank vs. Page*, 9 *Mass. Rep.* 155. *The same vs. Hammatt*, *Ibid* 159. *The Bank of Columbia vs. Okely*, 4 *Wheat.* 243. *Mandeville vs. The Union Bank of George-Town*, 9 *Cranch*, 1. *Riddle vs. Mandeville*, 5 *Cranch*, 331. *Yeaton vs. The Bank of Alexandria*, *Ibid* 51. *Jackson vs. The Union Bank of Maryland*, (*ante* 146.) *Lewis vs. Burr*, 2 *Caine's Cas.* 196, 198. *The Bank of the U. S. vs. Norwood*, 1 *Harr. & Johns.* 423. *Noble vs. Kennoway*, *Doug.* 510, 513. *Liftley vs. Mills*, 4 *T. R.* 172. *Smith vs. Kendall*, 6 *T. R.* 123. The act of 1793, ch. 30, s. 9; and *The Union Bank vs. Hyde*, 6 *Wheat.* 573.

T. B. Dorsey, (Attorney-General,) for the Appellee, contended, on the *first* bill of exceptions, that whether the witness was interested or not, the court below did right in rejecting his testimony. That the answer of the witness that he was interested, was sufficient, without any thing else, for the rejection of his evidence. On the *second* bill of exceptions he contended, that there was no legal notice given to the endorser, and that a proper foundation had not been laid for calling on the court to decide on the custom. Where a place of payment is mentioned in a note, the demand must be made there. Here the note was not dated at

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any particular place; and although it was negotiable at the *Bank of Columbia*, it was not payable there. The maker did not reside in the District of *Columbia*, and it was not to be inferred that he had a knowledge of the custom alleged. He referred to *Sanderson vs. Bowes*, 14 *East*, 500. *Ambrose vs. Hopwood*, 2 *Taunt.* 61. *Dickinson vs. Bowes*, 16 *East*, 110. The three days of grace are founded upon statute, and not simply on the custom. *Brown vs. Harraden*, 4 *T. R.* 151. *Tindal vs. Brown*, 1 *T. R.* 169. *Saunderson vs. Judge*, 2 *H. Blk. Rep.* 509. *Smith vs. Kendall*, 6 *T. R.* 123. He also contended, that the declaration did not state the custom relied on by the appellants' counsel.

Jones and F. S. Key, in reply, to show that the custom need not be set out in the declaration, referred to precedents in *Lilly's Entries*, 1 *Harris's Entries*, and 2 *Chitty's Pleadings*, of declarations on bills of exchange and promissory notes. Also to *Hodsden vs. Harridge*, 2 *Saund.* 61. *Beck vs. Thompson & Maris*, in this court at December term 1819. *Hawkins vs. Jackson*, (*ante* 151, *note.*) *Rushton vs. Aspinall*, *Doug.* 679. 1 *Esp. Dig.* 60. If the declarations was defective, the appellee could not take advantage of it at this time.

Curia adv. vult

At this term the opinion of the court was delivered by EARLE, J. There were two bills of exceptions signed in the trial of this case, which from the record appears to be a suit brought by *The President, Directors and Company of the Bank of Columbia*, as endorsees of a promissory note, against the administratrix of *Thomas C. Magruder*, the first endorser. The note was drawn by *George Magruder*, on the 2d of February 1815, and made payable to the appellee's intestate, sixty days after date; and payment of it is stated in the declaration to have been demanded on the 7th of April 1815, which is the day after the usual days of grace.

The plaintiffs produced *George Magruder*, and offered to prove by him that the note was discounted at bank, to raise money for *Thomas C. Magruder*, alleging that he was in truth the drawer, and not entitled to notice. He was objected to on the score of interest, and rejected as an incompetent witness to prove the facts for which he

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was produced; and from the rejection has arisen the only question this court has to decide on the *first* bill of exceptions. *George Magruder*, on the *voir dire*, expressed his doubts of his interest in the event of the cause, and represented it to depend upon the solution of a question, which was not solved by the court, and which perhaps from his statements they could not answer, if it had been their province to decide it. We do not then consider him a witness, declaring himself on oath to be interested, nor as a witness, believing himself to be so, in neither of which lights has he been contemplated by us in the opinion we have formed on this subject.

Independent of the views he has himself taken of his situation, the true question is, Has he in fact such a direct interest in the event as ought to exclude him from giving testimony on behalf of the appellants? If he has such an interest, this court has been unable to discover it. A recovery against the administratrix of the endorser, will put nothing into his pocket; and as a judgment has already been obtained against him as the drawer of the note, it will not screen him from an execution, which the bank may at any moment issue against him.

Should the case be established on his testimony against the administratrix, and the principal, interest and costs, recovered of her, she will have her remedy against him as drawer, and it is not easy to perceive how the evidence given by him, or the verdict founded on it, could any way benefit him in the defence he may please to set up to her action. If the account he has spoken of is used in bar of her suit, it must be supported by competent testimony, wholly unconnected with his narrative concerning the original negotiation between him and the endorser; and he can have no advantages in such defence which he would not have in an action instituted against the administratrix on the same account. A recovery in this cause against the administratrix will carry the costs, and as far as they go, will augment her demand against *George Magruder*; and in this view he may be said to be a witness swearing against his interest. Deeming him every way a competent witness, we think he ought not to have been prevented from giving testimony for the plaintiffs.

The *second* bill of exceptions embodies all the testimony in this cause. The appellants, who were the plaintiffs in

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the court below, having by competent testimony offered to prove, among other things, that it had been the uniform and unvaried practice and custom, from the year 1792 to the year 1818, of the Bank of *Columbia*, and of all the other banks of *Washington* and *George Town*, to demand payment of promissory notes, of the drawers thereof, on the day after the last day of grace, and in default of payment, to give notice on the same day to the endorsors; and having offered to prove that the endorser, *Thomas C. Magruder*, had a knowledge of this custom, and the universality of it, by showing that in the year 1813 he received an accommodation in the *Union Bank of George-Town*, on a note drawn by himself for a considerable sum of money, which was continued in that bank; and having also offered to prove, by the testimony of the clerk of the notary public, that he demanded payment of the note of the drawer, *George Magruder*, on the seventh day of April 1815, which was refused, and that on the same day he gave notice of the demand and refusal to the endorser, *Thomas C. Magruder*, in a letter put into the post office in *George Town*, addressed to him as residing near that place, being previously instructed, by the best information he could get, that he resided near *George Town*, and that it was usual to forward notices or letters to him through the medium of the *George Town* post office, addressed to him near *George Town*, prayed the court to instruct the jury, that if they believed from the evidence the custom to have been as stated, and to have been known to the defendant's intestate at the time he endorsed the note, then it was competent to the jury to presume that the intestate consented to the said custom, and agreed that the demand and notice should be conformable to the said custom; and that if the jury believed, from the evidence, that the notary public used due diligence to ascertain where the intestate lived, and where to address the notice to him, and did address the same to him accordingly, then the said notice is sufficient; and if the demand and notice was made and given according to the aforesaid custom of the banks, then the plaintiffs are entitled to recover. This instruction was refused, and the refusal has given rise to the discussion of several points in this court, two of which we shall proceed briefly to examine. One relates to the time of demand of payment of the drawer of the note, and the other to the legal sufficiency of the notice given to the endorser.

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The demand was made on the day after the three days of grace, and cannot create a responsibility on the endorser, unless it was made in conformity to the established practice and custom of the bank, which were well known and understood by him. Had the prayer been gratified by the court, these facts would have been investigated by the jury, and if established against the endorser, they would inevitably have led to the conclusion, that he was liable to the plaintiff's action. A custom like this, brought home to the knowledge of the party dealing with the bank, enters into the essence of the contract, becomes a constituent part of it, and must have its due weight in the exposition of it.

The allowance of three days of grace, in the payment of negotiable paper, from long and universal usage, has become the general law of such contracts, but it is not such an inflexible rule as admits of no innovations upon it.

It may be altered and controled by the agreement of the parties, and what is tantamount, it may be changed by the usage and custom of dealing perfectly known to the parties, and to which they will be supposed to have had special reference in making their contract. If it was an established and unvaried usage of the Bank of Columbia to exceed the three days of grace, and to demand payment on the fourth day, and this was well known to *Thomas C. Magruder* at the time of the endorsement, he is to be supposed to have assented to it; and this departure from the general rule will be sanctioned, to give efficacy to the contract, and to establish his liability to pay the money. It gives us pleasure to know, that we are supported in those ideas by the supreme court of the *United States*. In their late decision of the case of *Renner vs. The Bank of Columbia*, 9 *Wheat. Rep.* 581, they have fully recognized them. The opinion of the court, delivered by Judge *Thompson*, is an able exposition of the law of commercial contracts, and of the legal influence the custom and usage of particular banks may have upon them, and will unquestionably be regarded by all as a commanding authority on such subjects. We close this part of the case with a single remark, in answer to the objection taken on the argument to the declaration in the cause. It is this, that however faulty it may be, in stating the demand on the fourth day, or in omitting to state

the custom and the endorser's knowledge of it, upon neither of which points do we now undertake to decide—the objection cannot at this time be supported. If there is any thing in the allegation, advantage ought to have been taken of it on demurrer, or perhaps on the trial, by way of exception to the admissibility of the evidence, and in neither of these forms can it at present be considered.

With regard to the notice to the endorser of the demand on, and refusal of payment by the drawer, it too would have been examined by the jury, if the instructions asked for on this head had been given by the court. If it had been ascertained by the jury, that the clerk of the notary public had demanded payment of the note of the drawer on the seventh day of April 1815, according to the usage and custom of the bank before alluded to, and that on the same day he gave notice of the demand and refusal to the endorser, in a letter put into the post office in *George Town*, addressed to him as residing near that place, having been previously instructed, by the best information he could get, that the endorser resided near *George Town*, and that it was usual to forward notices or letters to him through the medium of the *George Town* post office, addressed to him near *George Town*, we can have no doubt that this would have been sufficient notice to charge the endorser. When the party to be affected by the notice resides in a different place from the holder, the rule is, that the notice may be sent through the post office to the post office nearest to the party entitled to such notice. *Ireland vs. Kip*, 11 *Johns. Rep.* 231. *Freeman vs. Boynton*, 7 *Mass. Rep.* 483. Here the rule we think has been complied with, considering, as we must do, the post office at *George Town* to be the post office nearest to the endorser, in the absence of all proof that there was a post office nearer to his residence.

We therefore dissent from the opinions expressed by the court below in both of the bills of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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BARNEY vs. PATTERSON'S LESSEE.

APPEAL from Baltimore county court. Ejectment for a lot of ground in the city of Baltimore. Plea, *non cul.*

1. At the trial the plaintiff, (now appellee,) having produced a title to the lot in dispute down to *Aquila Brown*, gave in evidence, that *Brown*, being largely indebted to the *United States*, had removed from this state, (where he had before resided,) sometime in the year 1802, and had for several years last past resided in some part of *Europe*, and that the *United States* caused and procured process of attachment to be laid upon said lot, as the right and property of said *Brown*, and certain proceedings and judgment thereon to be had in the circuit court of the *United States* for the *Maryland District*, and also a *feri facias* to be issued from said court on that judgment, and levied

The petition, commission, and other proceedings before commissioners of bankruptcy, and their judgment thereon, are not evidence for the purpose of showing that a person had become and had been declared a bankrupt under the provisions of the act of congress.

The Circuit Court of the *United States* has jurisdiction and authority to award an attachment, under the act of 1715, *ch. 40*, on the return of *non est* to writs of *capias ad respondendum*, sued out in the name of the *United States*, against the goods and chattels, lands and tenements, of a defendant, whether he be in fact a resident of the state or not.

An attachment will lie against the property of foreigners, whether they have been residents within the state or not. (*and note.*)

As proof of the cause of action to warrant the issuing an attachment in the name of the *United States*, a bill of exchange, drawn by the defendant, and payable to J. C. and by him endorsed to T. T., the treasurer of the *U. S.*, as their agent, and to and for their use, and duly protested for nonacceptance and for nonpayment, was with protest for nonacceptance filed in court, and it being stated that the *U. S.* had complied with the law, and had made proof of their damages, &c. — Held to be sufficient.

An attachment under the act of 1715, *ch. 40*, may be awarded against the lands and tenements, as well as the goods, &c. of the defendant.

Under the construction given to the statute of 5 *Geo. II. ch. 7*, lands became liable to be taken and sold by *feri facias*, in the same manner as goods and chattels, and are subject to attachment.

An attachment ought regularly to issue as of the term at which it was awarded; and it is the duty of the sheriff to serve the *scire facias* in the attachment on the persons who are found in possession of the property attached, and to certify such service: or if the property is unoccupied, to make a corresponding return.

Although the intervening of a term before the issuing of an attachment which is awarded, and the negligence of the marshal in not serving the *scire facias* in the attachment, &c. and making his return in conformity thereto, are irregularities in the proceedings of the circuit court offered in evidence, yet the judgment of condemnation is not therefore void, that court being a court of record of competent jurisdiction, from whose decisions an appeal or writ of error lies to the supreme court.

It is not like the case of special and extraordinary powers given by statute to a court which has no jurisdiction independent of such statute.

The proceeding by attachment is only process to compel the appearance of a defendant whose person cannot be reached by the process of the court; and is not a proceeding in derogation of the principles of the common law, but rather in mitigation of the severity of the common law in favour of defendants.

Foreign judgments are not conclusive, but are always examinable, where the parties claiming the benefit of them apply to the court of this country to enforce them. But such judgments when coming incidentally in question, have the same force and effect as domestic judgments.

A judgment of the circuit court of the *U. S.*, if treated as the judgment of a foreign tribunal of competent jurisdiction, stands upon the same footing, when offered in evidence, as a domestic judgment, and is not liable to be impeached for any irregularity, though such irregularity would be a sufficient ground for reversal in an appellate court.

A judgment of the circuit court of the *U. S.* is not to be treated as a foreign judgment.

The doctrine that judgments and decrees are only evidence in suits between parties and privies, is not applicable where such judgments are introduced, not as binding *per se*, but only as documents connected with the chain of a plaintiff's title in ejectment.

Where there is a subsisting judgment by a court of competent jurisdiction, a *feri facias* thereon clothes the sheriff with authority to sell, and if the judgment be afterwards reversed, the title of the purchaser will not thereby be defeated.

If the return to a *feri facias* does not set out the name of the purchaser, and there is no description given of the property sold, it might perhaps be set aside on motion. But it is not the return of the sheriff that gives title to the purchaser, but the previous sale.

As a sheriff's sale of land is within the statute of frauds, some memorandum in writing is necessary. It is therefore right and proper, that there should be a special return of the *feri facias*, particularly describing the premises, and setting out the name of the purchaser; either of which, though not operating to pass the title, would be safe and competent evidence of the sale.

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Upon said lot. A record of this attachment, proceedings, judgment and *feri facias*, the plaintiff offered in evidence. By the record it appeared, that an action on the case was brought in the circuit court of the U. S. for the fourth circuit in and for the District of Maryland, by the United States against Brown, on the 24th of September 1816, and the writ of *capias ad respondendum*, which then issued returnable on the 7th of November then next, was returned *non est*; that an *alias* writ of *capias ad respondendum* was issued on the 17th of March 1817, returnable on the 1st of May following. On that day the last mentioned writ was also returned *non est*, and a declaration in the usual form was then filed on a bill of exchange, dated at Baltimore on the 22d of December 1801, drawn by Brown on Messrs. Van Staphorst & Co. at Amsterdam, for 60,000 guilders, Holland currency, payable 60 days after sight to the order of James Clarke. The bill was endorsed by Clarke, payable to Brown and Hackeman, or order, and by them endorsed to B. Owings, or order, who endorsed it to T. Tucker, treasurer of the United States, and agent of the U. S. and to and for the use of the U. S. The bill not being accepted was, on the 16th of March 1802, protested for nonacceptance and not being paid, on the 19th of May 1802, was protested for nonpayment. The United States filed in court the bill of exchange, and protest thereof for nonacceptance, and on the prayer for a writ of attachment against the lands, &c. of Brown, according to the act of assembly of this state, &c. to attach for them to the value of their damages and costs; and it appearing to the court, that the United States had complied with the law as alleged, and having made proof to the court of their damages to the amount of \$58,201 71, a writ of attachment was awarded against the lands, &c. of Brown, in the usual manner. (2 Harr. Ent. 78.) On the 2d of April 1818, a writ of attachment against the lands, &c. of Brown, was issued in the usual form of an attachment on judgment after two *non ests*, with a clause of *scire facias*, &c. (2 Harr. Ent. 612,) returnable on the 1st day of May ensuing. On that day the marshal of the district made this return of the attachment, viz, "4th April 1818, attached and appraised as per schedule." The schedule stated that the lands and tenements of Brown had been seized and taken by the marshal by virtue of the writ of attachment, and being ap-

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praised by four appraisers, &c. were as follows, viz. "A lot on *Market Street* in the city of *Baltimore*, fronting on said street about 66 feet, and about 166 feet deep to *Cowpen Alley*, having a three story brick house, and a two story frame store thereon, viz. 66 feet front, estimated at \$300 per foot, \$19,800." Then follow other lots and improvements, with their value. This appraisement was signed and sealed by the appraisers: *Brown*, although solemnly called, did not appear, and on the prayer of the *United States* the lot and premises above described were condemned to satisfy the *United States* the damages and costs aforesaid, security being given in the usual manner. (*Harr. Ent.* 83.) Upon this judgment of condemnation a writ of *feri facias* issued on the 19th of May 1818, directed to, and commanding the marshal of the district; that of the lands and tenements above described and condemned, he should cause to be made and levied the damages and costs aforesaid, to render to the *United States*, &c. on the 7th of November then next. At the return day the marshal made this return of the writ of *feri facias*: "I hereby certify to the Circuit Court within mentioned, that by virtue of the within writ to me directed, I have caused to be made, of the lands and tenements of the within named *Aquila Brown*, the sum of \$16,104 84, current money, which I have here ready to render to the within named *United States*, in part of the damages, costs and charges, in the said within writ specified. So answers," &c. The plaintiff further gave in evidence, that *Paul Bentallou*, esquire, the marshal of said District of *Maryland*, to whom said writ of *feri facias* was directed, after having levied the same upon the said premises, gave this notice by advertisement of the sale of said premises: "*Marshal's sale*. By virtue and in pursuance of a writ of *feri facias*, from the Circuit Court of the *United States* for the fourth circuit, in the District of *Maryland*, to me directed, will be sold at public auction, for cash, on the premises, at four o'clock in the afternoon, on Monday the 8th June next, the following valuable property, situated on the north side of *Baltimore St.* between *Howard* and *Eutaw Streets*, and running back to *Cowpen Alley*, to wit. 1st. The lot with the three story dwelling, and all the improvements thereon, formerly occupied by the late Judge *Nicholson*, and now by Mr. *John Barney*, fronting *Baltimore Street* about 33 feet, and

running back about 166 to *Cowpen Alley*. 2d. The adjoining lot, with a frame warehouse thereon, formerly occupied by Messrs. *Hollingsworth* and *Sullivan*, and now by Mr. *Abraham Buckwalter*, as a flour store, having, as the foregoing, 33 feet front on *Baltimore-Street*, and running back about 166 feet to *Cowpen Alley*; which said lots and tenements have been levied upon, and are to be sold towards satisfying a claim of the *United States*, in virtue of judgments of the aforesaid court against *Aquila Brown*, late of *Baltimore*, merchant. On the full payment of the purchase money, deeds conveying all the right acquired by the *United States* to the aforesaid property, will be executed by

Paul Bentalou, Marshal,
District of *Maryland*."

The marshal exposed said premises to public sale on the 8th day of June, in the year 1818, and at said sale, *William Patterson*, the lessor of the plaintiff, was the purchaser and highest bidder, by bidding the sum of \$16,104 84, and the marshal, upon receiving said purchase money, on the 29th of June 1818, duly made and delivered to *Patterson* a deed for the lot and premises as the same are described in the declaration of ejectment in this cause. This deed, after reciting the judgment for attachment, the writ of attachment, return thereof, judgment of condemnation, and the *fieri facias* thereon issued in the manner as herein before stated, proceeded as follows: "And whereas the said writ came to the hands of the said marshal, who in pursuance thereof, after giving due notice of the time and place of sale, did set up and expose to sale, at public auction, on the premises, all that part of the lot, piece or parcel of ground, taken on the writ of attachment aforesaid, which is contained within the metes and bounds, courses and distances following; that is to say, beginning," &c. describing the lot as the same is described in the declaration in this cause. At which said sale, that is to say, on the 8th of June 1818 aforesaid, the above named *William Patterson* became the highest bidder for, and purchaser of the part of a lot of ground above particularly described, with the appurtenances, at and for the price or sum of \$9,900. In consideration of which said sum of money the marshal conveyed the premises to said *Patterson*; which said deed was duly acknowledged and recorded. The plaintiff further gave in evidence, that *Brown* was a merchant engaged in

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commerce in the city of *Baltimore*; and, for the purpose of showing that he had become, and had been declared a bankrupt, under and by virtue of the provisions of the statute of the *United States* in such case made and provided, the plaintiff produced, and offered to read in evidence, the petition, commission, qualification, depositions, and other proceedings before the commissioners of bankruptcy, duly appointed and qualified, and their judgment thereon, which are set forth; and also a deed from the commissioners aforesaid to *George Grundy* and *Joseph Thornburgh*, who had been duly appointed assignees of the creditors of said *Brown*, which deed is also set out; and also gave in evidence a deed from said *Grundy* and *Thornburgh*, to the lessor of the plaintiff, dated the 27th of January 1819, reciting that they had, at public sale, after due notice, &c. sold the lot and premises herein before described, to *William Patterson*, for the sum of \$50, it being the same lot and premises conveyed by *Bentalou* to *Patterson*. But the defendant objected to the admissibility of said petition, commission, qualification, depositions, and other proceedings last mentioned, for the purpose last aforesaid; but the court, [*Ward, A. J.*] overruled the objection, and permitted said evidence to be read to the jury, for the purpose for which it was offered. The defendant excepted.

2. The defendant then prayed the opinion of the court, and their direction to the jury, that upon the matters so as aforesaid given in evidence by the plaintiff, the plaintiff was not entitled to recover; which direction the court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before *BUCHANAN*, Ch. J. *EARLE*, *MARTIN*, and *STEPHEN*, J.

Wirt, (Attorney General of *U. S.* and *Harper*, for the Appellants, stated, that the appellee claimed title to the property for which the ejectment was brought, 1st. Under a deed from *Grundy* and *Thornburgh*, assignees of *Brown*, a bankrupt; and 2d. Under a deed from *Paul Bentalou*, marshal of the *U. S.* in and for the District of *Maryland*. They contended, 1. That the deed from the assignees was not evidence of title without proving the act of bankruptcy committed, and that the record of the proceed-

ings before the commissioners, being the only evidence offered for that purpose, was inadmissible.

2. That the deed from the marshal passed no title to the lessor of the plaintiff—1st. Because the circuit court of the U. S. for the fourth circuit in and for the district of Maryland, had no rightful jurisdiction of the cause in which the judgment was given and the *fieri facias* issued, by virtue whereof the marshal sold the property. 2d. Because the proceedings in said cause, the record of which was given in evidence by the plaintiff below, were irregular, erroneous and defective, and therefore wholly void. On the first point they referred to a decision of this court in *Wood vs. Grundy & Thornburgh's Lessee*, at December term, 1810, as conclusive that there must be proof of bankruptcy, independent of the proceedings of the commissioners. On the second point they contended, 1. That the record of the circuit court was not evidence, as neither of the parties in this case were parties in that proceeding; and that the general rule was, that a judgment was not conclusive except between parties and privies, that it might be evidence, but that it was not conclusive evidence. They referred to *Barr vs. Gratz*, 4 Wheat. 220. *Morgan's Lessee, vs. Davis*, 2 Harr. & M. Hen. 9 Runn. Eject. 110. *Gilb. Evid.* 9. 2 *Esp. Dig.* 12. *Pullen vs. Birbeck*, 1 *Ld. Raym.* 718. 2 *Salk.* 563, *S. C.* That here was a judgment of condemnation on an attachment, which was entitled to less respect than other judgments. That it was not *prima facie* evidence of a debt, and whenever it came before the court, either incidentally or otherwise, might be examined into. They referred to *Buchanan vs. Rucker*, 9 East, 192. *Buttrick vs. Allen*, 8 Mass. Rep. 273. *Pawling vs. Wilson & Smith*, 13 Johns. Rep. 192. *Phelps vs. Holker*, 1 *Dall. Rep.* 261. *Kilburn vs. Woodworth*, 5 Johns. Rep. 37. *Robinson vs. Ward's Ex'rs.* 8 Johns. Rep. 86. *Fenton vs. Garrick*, *Ibid* 197. *Bissell vs. Briggs*, 9 Mass. Rep. 464. *Borden vs. Fitch*, 15 Johns. Rep. 141. 1 *Philk. Evid.* 254, (note.) That the proceeding under attachment was borrowed from the custom of London, and being in derogation of the common law, was to be strictly pursued. They referred to 1 *Com. Dig.* tit. *Attachment*, (I.) 604. *Davidson's Lessee vs. Beatty*, 3 Harr. & M. Hen. 534. *West vs. Hughes*, 1 Harr. & Johns. 6. *Shivers vs. Wilson*, 5 Harr. & Johns. 130. That the proceeding under the at-

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attachment being given by the act of 1715, *ch. 40*, is confined by the 2d section of that act to inhabitants or residents in the state; and the 3d section applies to a different class of persons, absent out of the province, where a short note, &c. was to be left. That this proceeding was under the *second* section of the act, and did not take in the case of *Brown*, who was not an inhabitant or resident of the state when the writ of *capias ad respondendum* issued against him, at the suit of the *United States*, out of the *circuit court* of the *U. S.* that court seeking to carry into effect that act, and which court, they contended, had no jurisdiction thereof, being limited by the subject and character of the parties. That the party plaintiff should be one who might be a defendant, and here the *United States* were plaintiffs, and were not liable to be sued, so that the attachment law could not apply to the *United States*. To show that the circuit court had a limited jurisdiction, they referred to *Turner vs. The Bank of North America*, 4 *Dall. Rep.* 8. By the judiciary act 1789, *ch. 20, s. 11*, the circuit court had no jurisdiction in civil cases, unless the defendant was a resident of the district in which the court was held. Where the circuit court act upon the attachment law, it must appear that the party is absent out of the *U. S.* or that court has no jurisdiction. *Hollingsworth vs. Adams*, 2 *Dall. Rep.* 396. If the circuit court had no right to act upon the attachment law, no title accrued under the judgment of condemnation. In *Shivers vs. Wilson*, the character of the plaintiff was looked at; so here the character of the defendant must be looked at, to see if he comes within the description of persons pointed out in the *second* section of the act of 1715. He was neither an inhabitant, nor an absentee who was to return; and if he was liable to be proceeded against, he came within the *third* section of that act. 2. There was no proof of the cause of action by the plaintiffs; neither the hand-writing of the drawer, nor of any of the endorsors of the bill of exchange, was proved. There was no evidence that the bill had been presented for payment, and none that the debt was due. The bill was endorsed in blank, and no suit could be maintained thereon by the *United States*. They referred to *Ringgold vs. Tyson*, in this court, at December term 1810, and *Hudson vs. Goodwin*, 5 *Harr. & Johns.* 115. In the proceedings there is an

omission of an entire term between the judgment for attachment, and the issuing the writ. 3. There was no return made by the marshal to the clause of *scire facias* included in the writ of attachment. Nor was it stated whether the property attached was in the possession of a garnishee, or any other person. Nor was any garnishee summoned. 4. There was no copy of a declaration or short note left, as required by the act. 5. The act confines the attachment to goods, chattels and credits, and cannot be extended by construction to lands and tenements under the statute of 5 George II; and if not, then lands and tenements were not liable to be attached. 6. The return to the *fieri facias* is defective. The marshal returned that he made of the lands and tenements of *Brown, &c.* not showing that they were the lands and tenements mentioned in the *fieri facias*. Nor is it stated that they were sold to the lessor of the plaintiff, which must appear by the return, and cannot be supplied by the marshal's deed, which gives no title without the aid of a proper return to the *fieri facias*.

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Taney and *Magruder*, for the Appellee, stated, that the record of the circuit court had been treated by the counsel for the appellant as if it was under the review of this court on an appeal. When the act of 1715, *ch.* 40, passed, goods, chattels and credits only, were to be affected under it; but under the statute of 5 Geo. II, lands and tenements were liable to debts, by construction put upon that statute by our courts; and the same principle which led to that construction, led to its introduction into the attachment law; and since then it has been the uniform settled practice to attach and condemn lands and tenements. In *Davidson's Lessee vs. Beatty*, 3 Harr. & M. Hen. 600, 608, 612, 616, it was admitted by the counsel who argued the case, and by the court, that lands and tenements were liable to be attached and condemned. They contended, 1. That if the judgment of the circuit court was *res inter alios acta*, and was not evidence, there was no mode by which a party, deriving title under such a judgment and *fieri facias*, could establish it. But that the judgment might be offered in evidence, they referred to *Barr vs. Gratz's heirs*, 4 Wheat. Rep. 213. *Boring's Lessee vs. Lemmon*, 5 Harr. & Johns. 223. A court of competent

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jurisdiction, acting in the course of the common law, cannot have its acts impeached in a court of general jurisdiction, where the question comes before that court collaterally, and not by appeal. If the judgment was only *prima facie*, it would be sufficient for all the purposes of the appellee; but it is final and conclusive. They cited *The Marshalsea's Case*, 10 *Coke*, 76. *Tarleton vs. Tarleton*, 4 *Maule & Selw.* 21. Where the suit is on the judgment, the consideration may be gone into, but where the judgment comes in collaterally, it is final and conclusive. No person can impeach a judgment but a party to it, which he can do by way of appeal. A stranger has no right to call on the court to examine into the irregularities of other courts. *Kempe's Lessee vs. Kennedy, et al.* 5 *Cranch*, 173. *Pratt, et al. vs. Law & Campbell*, 9 *Cranch*, 478, 496. *Serg. Law Att.* 114, 116, 117, 121, 123. The records and proceedings in this case are offered in evidence as links in the chain of title, and are produced for the purpose of showing how the title passed to the lessor of the plaintiff, in the same manner as the deeds, under which the title was transmitted to *Brown*, were produced and offered in evidence. *Barr vs. Gratz*, 4 *Wheat.* 215, 220. *Goodtitle vs. Alker*, 1 *Burr.* 136. 1 *Phill. Evid.* 254, ch. 3, s. 3.

2. The subject of the jurisdiction of the circuit court is settled in *Kempe's Lessee vs. Kennedy, et al.* 5 *Cranch*, 185; and *Turner vs. The Bank of North America*, 4 *Dall.* 8.

3. Under the attachment act of 1715, the attachment is a mere process to compel the appearance of the defendant, and belongs to the common law, and is in aid of, and not in derogation of the common law jurisdiction; if borrowed from the custom of *London*, that custom was borrowed from the common law, and moulded so as to conform to the wants of the city. They referred to *Coombes vs. Clements*, in this court at June term 1819. 3 *Blk. Com.* 272, to 282. 1 *Tidd's. Pr.* 105, 108, 135 to 137. 1 *Saund.* 67, (note.) The circuit court is a court of general jurisdiction, and being so, the attachment was a process which the court had a right to use; and having used it, whether right or wrong, it is not for this court to investigate the subject; that is a question only for the supreme court, on an appeal. If this court had a right to examine into the correctness of the judgment, and their decision was opposed to that of the supreme court, there would be two laws

on the same subject incompatible with each other. By the judiciary act, 1789, *ch.* 20, *s.* 14, the court may issue all process which may be necessary; and by the 34th section, the laws of the respective states are to be the rules of decision for the government of the *United States*. *Robinson vs. Campbell*, 3 *Wheaton*, 212. Under the act of 1715, upon two *non ests*, the plaintiff may proceed against all description of persons, and it was so decided by the general court in *Willis vs. Pearce, Garn. of Garrigues, (a.)* If the act admitted of a different construction, how can the fact be come at that *Brown* was not a resident of the state? The record does not show that he was not a resident. The writ and declaration states him to be "late of the *Maryland* district, merchant," which means, that he is in the district according to our practice against all residents of the state. There is nothing in the act which sanctions the principle, that a party who could not be a defendant did not come within the provisions of the act. The proof of the cause of action need not be set out in the proceedings; all that was necessary was, that the court should be satisfied that the money was due, and to satisfy themselves of that, they could resort to *viva voce* proof. The record states that the *U. S.* made proof of their demand. This was sufficient, and such are the forms in 2 *Harr. Ent.* 78, 79, under the act of 1715. There is nothing in the objection, that there is no return made of the

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(*a.*) The case here referred to of *Willis vs. Pearce, Garnished of Garrigues*, in the general court at April term 1789, was on an appeal from *Kent* county court. It was an attachment on judgment under the act of 1715, *ch.* 40, where two *non ests* had been returned on writs of *capias ad respondendum*. It was alleged, and so stated in the record, that the party, against whose effects the attachment issued, *had never been a resident of this state*. The county court quashed the attachment upon this ground, and the plaintiff appealed to the general court. The cause was argued by *Lethbrury* for the appellant, and by *T. Wright* for the appellee. *Martin*, (Attorney General,) though not concerned as counsel, expressed his opinion—that he himself, when he first came into the practice, shortly after the revolution, had put the same construction on the act of assembly of 1715 which had been given by the county court; but, upon inquiry, he had found that the practice had been so long and uniformly to the contrary, under the act of 1715, that he thought it was not now to be shaken.

HARRISON, Ch. J. The judgment of the court below must be reversed. It has always been the practice, that attachments under the act of 1715 would lie against the effects of foreigners, notwithstanding they had never been residents. I remember a case many years ago, of an attachment against the effects of a resident in *Virginia*, and the practice has been uniformly so.

JUDGMENT REVERSED.

An attachment may issue against the property of foreigners under the act of 1715, *ch.* 40, whether they are or have ever been residents of this state or not.

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scire facias included in the attachment. The practice is to lay the attachment on the property, although no person is in possession; but where any person is in possession, then to take notice of the *scire facias*. *Campbell vs. Morris*, 3 *Harr. & M'Hen.* 535. *Davidson's Lessee vs. Beauty*, *Ibid* 594. It was not necessary that the attachment should have issued, returnable to the term succeeding the judgment; there is nothing in the act which requires it. The blank endorsement on a bill of exchange, by the decision of this court, must be filled up before verdict. Here there was no verdict. It is an objection to form, and has no foundation in reason. The *English* decisions are opposed to that of this court. Where the judgment is by confession, or by default, no advantage can be taken of such an objection, were it a valid one. The endorsement need not be filled up unless where *non assumpsit* is pleaded, and the plaintiff is put to the proof of his cause of action. The practice of the courts of this state, under the attachment law, so long and uniformly acted under, is evidence of the law. They referred to *M'Keen vs. Delancy*, 5 *Cranch*, 22, as a case in which proof of the practice was required, and that being obtained, it was considered the law. All the objections, previous to the judgment, are unfounded; and whether the judgment is correct or not, or whether the writ of *fieri facias* was regularly issued, cannot now be inquired into. The case stated admits the sale of the property by the marshal, and the purchase by the lessor of the plaintiff. And the law is, that the sheriff need not return the execution; and this court has said, in *Boreing's Lessee vs. Lemmon*, 5 *Harr. & Johns*, 225, that the legal estate, in the land sold under a *fieri facias*, is transferred, by the sale of the sheriff, to the vendee, by operation of law; and that a deed from the sheriff is unnecessary to vest the legal estate. If a deed was not necessary, a return by the marshal was unnecessary, as it need not be made. This is the law of *England*. 2 *Bac. Ab. tit. Execution*, 710, 740. The deed, without any thing else, is evidence of title, there must be some writing on the subject. 7 *Bac. Ab. Appendix, tit. Evidence*, 458. *Jeanes vs. Wilkins*, 1 *Ves.* 195. 2 *Tidd's Pr.* 918, 928. *Palmer's case*, 4 *Coke*, 74. *Palmer vs. Humphrey, Cro. Eliz.* 584. *Taylor vs. Cole*, 3 *T. R.* 295, 297. If the return is the only evidence of title, then the deed was

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unnecessary, and a nullity; and if the return is defective, the deed cannot aid it. There is no authority on which to ground the principle, that the return is necessary, and that the return alone vests the title to the property sold. The act of 1813, *ch. 102, s. 3, 4*, shows that a deed from the sheriff is to be given. It is a legislative exposition of the law on that subject. If the deed does not convey the title what operation has it? Is it of no value unless it co-operates with the return? The doctrine in *New-York* is, that the sale by the sheriff is to be established by legal proof, and that it may be proved as other facts are to be proved. They referred to *Jackson vs. Bartlett*, 8 *Johns. Rep.* 361. *Jackson vs. Bush*, 10 *Johns. Rep.* 223. *Jackson vs. Roosevelt*, 13 *Johns. Rep.* 97. *Jackson vs. Dickenson*, 15 *Johns. Rep.* 309. *Jackson vs. Sternbergh*, 1 *Johns. Ca.* 153. It is not the sheriff's sale nor his deed which vests the title in the purchaser, but the law. The return of the sheriff may be evidence, but the sale and payment of the purchase money may be proved in any other way. Courts have protected the title of purchasers of property at sheriff's sales, notwithstanding the *fieri facias* be erroneous, or the judgment on which it issued reversed. *Jeanes vs. Wilkins*, 1 *Ves.* 195. 2 *Bac. Ab. tit. Execution*, 740. *Drurie's Case*, 8 *Coke*, 143. The omission of the sheriff to make a proper return ought not to prejudice the purchaser.

Harper, in reply, stated, that the great question was, how far the proceedings in the circuit court were to be examined by this court. He contended that the judgment was to be considered as a judgment of a foreign court. It was a special proceeding, under a special authority, which was to be strictly pursued, and differed from ordinary proceedings in other cases in the ordinary course of the court's jurisdiction. By the law of *England* a judgment of a foreign court of admiralty having jurisdiction, is conclusive, because all the world have notice. But if the sentence professes to be made on particular grounds which are set forth, but which appear not to warrant the condemnation, the sentence will not be conclusive as to such facts. The sentence of a domestic court is conclusive within its sphere. But the judgments of foreign courts, acting out of their jurisdiction, are not conclusive, but examinable.

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So of a domestic court acting beyond its jurisdiction: A court exercising general jurisdiction may be vested with special powers in particular cases; and they must be exercised within the sphere of these special powers. To see that they have been so exercised, may be examined into. It has been urged, that the proceeding under the attachment law of 1715, was according to the course of the common law, using process to compel appearance. When the defendant is in court, the proceedings are according to the course of the common law; but when the attachment is resorted to; the course of the common law is abandoned. By the course of the common law a jury may pass on the claim. Here it is not permitted, but a judgment is rendered without the intervention of a jury. This proceeding is to affect the property of the defendant—a proceeding *in rem*. The common law course is against the person, and not the property, until the defendant has had an opportunity to defend himself: This is an essential departure from the common law. The writ of attachment is not an execution, and it was so decided in *Davidson's Lessee vs. Beatty*, 3 Harr. & M. Hen. 534, and *Owings vs. Norwood's Lessee*, 2 Harr. & Johns. 96. It is in the nature of mesne process; and a judgment of condemnation is not a common law judgment. It is a new and irregular proceeding; unknown to the common law, and grows out of some authority given by the statute, contrary to the common law; and being so given, the court must conform strictly to the statute. If the sentence of a court of admiralty, which is supposed to act according to the law of nations, may be impeached, there can be no reason why a domestic judgment should not. Suppose a man was tried and convicted in *Baltimore*, where the offence was not committed within the jurisdiction of the court, would not such a judgment be examinable? If so, there is no distinction in principle between that case and the one before the court. There is no reason why a person, not a party to the proceedings, should not take advantage of the errors therein. The defendant here is in possession, and it may be that he is so for a valuable consideration, and has a good title. But the proceeding in this case was under a special authority, to which the general law does not apply. In *Shivers vs. Wilson*, this court treated the proceeding as a nullity; and in *Kempe's Lessee vs. Kennedy*, 5 Cranch,

173, the supreme court held, that where a court of general jurisdiction acted within the sphere of its authority, its proceedings were not examinable when coming before them collaterally. But that where the jurisdiction was limited, it must be shown, upon the record itself, that the court acted within the sphere of its authority. So also in 2 *Esp. Dig.* 12. *Pullen vs. Birbeck*, 1 *Ld. Raym.* 718; and 2 *Salk.* 563, S. C. Where a special authority is delegated, and the acts under it are not legally and specially in pursuance of it, they are void; and where acts are void, all persons may take advantage of them. *Morgan's Lessee vs. Davis*, 2 *Harr. & M'Hen.* 9. The proceedings here are examinable in the same manner as a foreign judgment is. The state courts were foreign courts before the adoption of the constitution of the *U. S.* By the constitution some change was effected, so as to point out the manner in which the judgments, &c. of one state, should be evidence in another state. But the courts remain foreign to each other as they were before. A judgment in a court of the *U. S.* must be proved in the state courts in the same manner as foreign judgments are proved, and they are to be received and treated as such, and are only *prima facie* evidence. *Mills vs. Duryee*, 7 *Cranch*, 483. *Hampton vs. McConnell*, 3 *Wheaton*, 234. Here the judgment, and proceedings under it, are offered in evidence as an essential link in a chain of title, and it is examinable in the same manner that a conveyance would be, to see that it is correct in all its parts. There is no distinction between the judgment coming before the court collaterally and directly. Here it is brought in to give effect to the plaintiff's title, so that it comes directly before the court. There is no reason why the court should be precluded from looking into the judgment more in the one case than in the other. The questions decided in *Kempe's Lessee vs. Kennedy*, 5 *Cranch*, 185, & *Pratt vs. Law & Campbell*, 9 *Cranch*, 495, are not similar to the one before this court. In *Barr vs. Gratz*, 4 *Wheaton*, 220, the court did not say that the judgment was not examinable. Because it was *prima facie* evidence it does not follow that it was conclusive evidence. This case shows, that where the judgment is brought in collaterally, as a muniment of title, it is *prima facie* evidence. In *Tarleton vs. Tarleton*, 4 *Maule & Selw.*

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21, there was no objection to the jurisdiction of the court in *Granada*, which did what it had a right to do; and the court of K. B. was called upon to enlarge the sum awarded, which could not be done unless on appeal. In *Keilburn vs. Woodworth*, 5 Johns. Rep. 39, 41, a judgment in *Massachusetts* was offered in evidence in *New-York*; and although it was a good judgment in *Massachusetts*, yet the court in *New-York* refused to receive it as *prima facie* evidence. This authority is in favour of the appellant. This judgment is examinable on the ground of its being a foreign judgment, and its also being under a special authority in derogation of the common law. In the return to the *fieri facias* there is no designation or description of the property sold. The deed states, that the land was sold to the lessor of the plaintiff, and this is the only proof of the sale. There cannot be two modes of proof to supply defects in the return to a *fieri facias*. The return is the only legal evidence of the sale; and it is the only evidence of title under the sale. There is no principle of law which says, that a title to land can be made out by parol evidence. This was attempted in *Maydwell vs. Carroll*, in this court, at December term 1813. Parol evidence cannot supply the defect of a written title. The return of a sheriff is made under oath, but his deed is not, and cannot be entitled to the same weight as his return. In *Boreing's Lessee vs. Lemmon*, the sheriff's return was special, that he had sold the lands to the defendant. The court did not in that case say that the deed was evidence of title. The doctrine that a *fieri facias*, under which lands are seized and sold, need not be returned, is not applicable to our system of laws. It may do in *England*, where personal property only can be seized, and which passes by delivery. It is not so here where a fee simple is sold, and where all titles to land are matters of record.

BUCHANAN, Ch. J. delivered the opinion of the court. This is an appeal from the judgment of *Baltimore* county court, in an action of ejectment, brought by *William Patterson's* lessee, the appellee, against *John Barney*, the appellant.

The appellee claims title under a sale made to the lessor of the plaintiff by *Paul Bentalou*, marshal of the *United States*, in virtue of a writ of *fieri facias*, sued out of

the circuit court of the *United States*, for the District of *Maryland*, upon a judgment of a condemnation by that court, of the premises in question, on proceedings in attachment, in a suit instituted by the *United States* against *Aquila Brown*, to whom the premises so condemned and sold belonged. All discussion of the *first* bill of exceptions was waived by the counsel on both sides; but the question involved, having been heretofore differently decided in this court, we do not concur in opinion with the court below on that exception.

The question raised on the *second* bill of exceptions taken at the trial is, whether the lessor of the plaintiff acquired the legal title under and in virtue of that judgment and sale? On the part of the appellant it has been strongly urged, that he did not; *first*, on the ground that the proceedings under the attachment were *coram non judice*, and wholly null and void; and *second*, that the judgment of the circuit court is a foreign judgment, and not conclusive, but examinable.

By the *eleventh* section of the act of congress of 1789, *ch.* 20, it is provided, "that the circuit court of the *United States* shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the *United States* are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state." And by the *thirty-fourth* section of the same law it is enacted, "that the laws of the several states, except where the constitution, treaties, or statutes of the *United States*, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the *United States*, in cases where they apply."

The amount for which the suit was brought by the *United States* against *Brown*, far exceeded five hundred dollars, the circuit court therefore had full, complete and unlimited jurisdiction of the subject matter in dispute, under the *eleventh* section; and the laws of this state, applicable to the subject, being by the *thirty-fourth* section made rules of decision for the circuit court, that tribunal was clothed with all the power and authority to award an

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attachment possessed by the courts of this state, under the act of 1715, *ch.* 40. The *second* section of this act, upon which the proceedings in attachment in the circuit court were founded, is in these words: "from henceforth no attachment shall issue out of any court of this province, before a writ or summons be first made out, upon which writ, if the party defendant be an inhabitant, or resident within this province, and the sheriff shall return a *non est inventus*, one other writ or summons shall thereupon, in like manner aforesaid, issue forth against the said defendant; and if the sheriff shall, upon the second writ or summons, return a *non est inventus* likewise, an attachment shall and may, in manner and form hereafter set down, be awarded." The *third* section authorises an attachment, "such proof being made by the plaintiff of his action as the court shall think fit," to be awarded against the "goods, chattels and credits," of the defendant, with a clause commanding the sheriff, at the time of executing the attachment, to make known to the person or persons in whose hands or possession the goods, &c. attached are, to appear before the court on the return of the attachment, to show cause why such goods, &c. should not be condemned, &c. and directs that, if on the return day neither the defendant nor the garnishee shall appear to show cause to the contrary, the goods, &c. shall be condemned, and execution thereof awarded as in other judgments, the plaintiff giving security for the use of the defendant, (which was done by the *United States*,) to make restitution of the goods, &c. so condemned, or the value thereof, if the defendant shall at any time within a year and a day, in person, or by attorney, appear to the original action, and prove payment of the debt or demand, or otherwise in court discount or bar the plaintiff of the same, or any part thereof." In support of the first position it has been contended, that in the case of a foreigner no attachment can be awarded on the return of *non est inventus* upon a second *capias*, but that it will only lie where the defendant is an inhabitant or resident of the state, which, to give jurisdiction to the court, must appear upon the face of the proceedings in the cause; and that the proof in the record shows that *Brown* was not an inhabitant of this state at the time of suing out the writ of attachment, but was residing in *Europe*. To which it may be answered, that the proof of *Brown's* residence in

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Europe was taken at the trial of this cause in the court below, and not in the suit in which the attachment was awarded by the circuit court, with which it has no connexion. But that in both the writs of *capias ad respondendum*, the declaration, and the writ of attachment, he is styled *Aquila Brown, late of the Maryland District*. The bill of exchange, on which the suit was founded, is dated at *Baltimore*, and the declaration charges that *Brown* was residing in the *Maryland District*, and there carrying on the business of a merchant, at the time the bill was made. So that whatever may have been the fact in relation to his residence, it does, technically at least, appear upon the face of the proceedings that he was a resident of the state; and there is nothing in the case from which the contrary appears, or can be inferred; and if his being a resident was necessary to the jurisdiction of the court, is not the style and character given him in the proceedings *prima facie* sufficient to confer and sustain that jurisdiction? And what is there in the act of assembly requiring of a plaintiff to make proof of the residence of the defendant by affidavit, or otherwise, or to do any thing more than was done in the case of the *United States* against *Brown* to give jurisdiction to the court? No mode of proof is pointed out, nor any description of proof expressly required; all that is said is, that no attachment shall issue, where the defendant is a resident of the state, before a second *non est inventus* has been returned.

But is it true that an attachment can only be awarded under the *second* section against the goods, &c. of a resident defendant? The act is indeed silent as to foreigners *eo nomine*, but is it not prohibitory only as respects residents? The language used is, not that no attachment shall issue unless the party defendant be a resident of the state, or if he be a foreigner or nonresident, but the words are, "that from henceforth no attachment shall issue out of any court of this province before a writ or summons be first made out, upon which writ, if the party defendant be an inhabitant or resident within this province," &c. Then provision is made for the return of a first and a second *non est inventus*, before an attachment shall be awarded. But it is not provided that an attachment shall not be awarded if he be not an inhabitant or resident; and in the absence of any such provision, the construction found to have been

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given to that section of the act by the different courts of the state is, that on the return of two *non ests*, an attachment will lie against the property of the defendant, whether he be in *fact* a resident or not, and the practice has been so long settled as to command respect whatever would be the construction, if it was now *vexata questio*. It is also objected, 2d, that there was not sufficient proof made of the cause of action to warrant the issuing of an attachment. 3d. That the attachment awarded is against the lands, tenements, goods, chattels and credits, of *Brown*, whereas the act of assembly only authorises an attachment against the goods, chattels and credits. 4th. That a term was suffered to intervene between the time of issuing the attachment, and the term at which it was awarded. And 5th. That it does not appear that there was any service by the marshal of the *scire facias* contained in the writ of attachment, no notice being taken of any such service in his return of the attachment. The *second* and *third* objections have nothing in them; with respect to the former, the act of assembly prescribes no particular proof, but leaves it entirely in the breast of the court.

The bill of exchange on which the suit was brought, was exhibited to the court, and appears in the proceedings, and in the judgment for the writ of attachment it is recited, that the *United States* made proof to the court of their damages to the sum of \$58,201 71; and with regard to the latter, it is sufficient to say, that lands were not liable to execution for debt at the time of the passage of the act, and not being in terms embraced by it, were not subject to attachment. But under the construction given to the statute 5 Geo. II, *ch. 7*, lands became liable to be taken and sold by *fiery facias* in the same manner as goods and chattels, and have ever since been uniformly held to be subject to attachment by all the tribunals of the state.

The attachment in question, therefore, was properly awarded under the circumstances of the case, jurisdiction being given to the court on the face of the proceedings. If it were otherwise, property acquired in this state by foreigners residing without the *United States*, would be completely protected against their creditors, there being no other mode of reaching it, and when they are placed in no worse situation than citizens, and their property is subjected only to the same process, it is no cause of complaint

that they are styled and treated as citizens in the forms of proceedings.

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As to the *fourth* and *fifth* objections, the attachment should regularly have been issued as of the term at which it was awarded, and it was the duty of the marshal to have served the *scire facias* in the attachment on the person or persons who were found in possession of the property attached, and to have certified such service, or if the property was unoccupied, to have made a corresponding return. But though the intervening of a term before the issuing of the attachment, and the negligence of the marshal, were irregularities in the proceedings, the judgment of condemnation is not therefore void, (whatever disposition might be made of it by an appellate court,) the circuit court being a court of record of competent jurisdiction, from whose decisions an appeal or writ of error lies to the supreme court of the *United States*, and is not an *inferior court* according to the technical sense of the term as used in *England*. It is not like the case of special and extraordinary powers given by statute to a court in relation to a subject matter of which such court has no jurisdiction independent of the statute, but derives its authority to act upon facts arising *in pais* entirely from the statute giving the power, and prescribing the mode of proceeding. The act upon which the proceedings of the circuit court were founded, professes to give no new jurisdiction, but only to regulate and limit the powers of courts already possessed of full and complete jurisdiction of the whole subject matter. The preamble is in these words: "Whereas it is highly expedient to settle the manner of proceedings on attachments, and limiting the extent of them, and to provide what shall be levied on such attachments and executions." It belongs to the sovereign authority of a state to prescribe the manner of proceeding in its courts of justice, and to make such provisions for the recovery of debts as the legislature may deem most expedient. The proceeding by attachment under that law is only process to compel the appearance of a defendant to a suit before brought and depending in a court of competent jurisdiction, whose person cannot be reached by the process of the court, of which it comes in aid, and without which the plaintiff would be without remedy; and it is not a proceeding in derogation of the principles of the common law, but rather in mitigation

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of the severity of the common law in favour of defendants: By the common law, where a defendant was summoned, and would not appear, his goods were liable to be proceeded against by attachment and distress infinite, and the goods seized were forfeited to the king; and where the defendant was abroad or kept out of the way so that he could not be arrested, the plaintiff might proceed against him to outlawry, which was also attended with a forfeiture to the king of all his goods and chattels: The proceeding to outlawry, or by *distringas*, was to compel the appearance of the defendant; and so with the attachment here, it is only a proceeding against the defendant's goods, to compel his appearance, with this difference in favour of the defendant, that a year and a day is given him to come in and appear to the original action, and if he can defeat it, to have a return of his property without any forfeiture to the state. And it would seem, from the language of the preamble, that the act was passed with a view to a mitigation of the rigour of the common law; and an outlawry, though illegal because the party was beyond sea, cannot be set aside by a third person in a collateral action, but is voidable alone by the party himself, and that only *sub modo* by his appearing and putting in bail. 6 *Com. Dig.* (C 2,) 488. *Simonds vs. Parmiter*, 1 *Wm. Blk. Rep.* 20. And in the case of *The Marshalsea*, *Coke*, 77, it is laid down, "that if the court of common pleas hold plea in debt, trespass, &c. without an original, it is not *void*, for they are judges of those pleas, and it cannot be said that the proceeding is *coram non judice*," and surely in such case the irregularity is as great as any appearing in the proceeding before the circuit court. And in the same book, 76, it is said, "That if the court of common pleas, in a plea of debt, awards a *capias* against a Duke, Earl, &c. which by *law* doth not lie against them, and that appears in the writ itself; and if the sheriff arrests them by force of the *capias*, although the writ be against law; notwithstanding, inasmuch as the court has jurisdiction of the cause, the sheriff is excused;" which could not be if the proceeding was *void*.

With regard to the *second point* raised, "that the judgment of the circuit court is a foreign judgment and not conclusive but examinable," the long and well established rule in *England* is, that foreign judgments are not conclusive, but are always examinable, where the parties

claiming the benefit of them apply to the courts of that country to enforce them; as, if an action of debt or *assumpsit* be brought upon such a judgment, it is only *prima facie* evidence of the debt, and may be impeached by the other party; but that the judgments of foreign courts of competent jurisdiction, when coming incidentally in question, have the same force and effect with domestic judgments. That principle was recognized and adopted in *Pennsylvania* in *Repelje vs. Emery*, 2 *Dall.* 231, and in the supreme court of the *United States*, in *Croudson & others, vs. Leonard*, 4 *Cranch*, 434; and the same principle applying with equal force in this state, the same rule will be adopted here. Treating then the judgment of the circuit court as the judgment of a foreign tribunal of competent jurisdiction, it stands upon the same footing that a domestic judgment offered at the trial for the same purpose would have done, and was not liable to be impeached in the *Baltimore* county court for any mere irregularity, though such irregularity should be a sufficient ground for reversal in an appellate court, unless the *Baltimore* county court could have erected itself into a court of errors to revise and correct the proceedings of the circuit court, nor can it be here. But under the peculiar structure of our political system, it should not be treated as a foreign judgment. The constitution and laws of the *United States* are the supreme law of this state; the laws of this state furnish rules of decision for the circuit court, and causes commenced in the state courts may be removed for trial into the circuit court. The citizens of the state are returned and serve as jurors in that court, and are amenable to its process; and their property, real and personal, is liable to seizure and sale by the marshal of the district, under executions issued upon the judgments of that court, with other attributes of a domestic court, belonging to that tribunal, which place it on a ground very different from that of a foreign court.

This judgment is also objected to on the ground, that it is *res inter alios acta*, the appellant not being a party to the proceedings. But the doctrine that judgments and decrees are only evidence in suits between parties and privies, though generally true, is not applicable to this case; the judgment of the circuit court being introduced, not as binding *per se*, upon the rights of the appellant, but only

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as a document connected with the chain of the appellee's title, and is no more obnoxious to objection, than a deed from *Brown*, or any other title papers, equally *res inter alios acta*, would be. Without showing that judgment, under the authority of which the sale by the marshal was made to the lessor of the plaintiff, the validity of that sale would not be established; and to reject it, would be in effect to decide that a title derived under a sale by a marshal or sheriff is of no validity in a suit by or against a stranger, and to render the law in relation to sales of land, by *fieri facias*, worse than a mockery.

It has further been contended in argument, that the lessor of the plaintiff acquired no title by his purchase from the marshal, on the ground—1st. That a *fieri facias* issued upon an erroneous judgment confers no authority upon the officer to sell; and 2d. That the marshal's return on the *fieri facias* is imperfect and void. The answer to the first of these positions is, that if it should be admitted that there are irregularities in the proceedings under the attachment, which would on appeal to the proper tribunal be sufficient cause for a reversal of the judgment, yet that judgment is not only not *void*, but has not been reversed, and is still in full force, and cannot be impeached by a stranger, in another court, in this collateral way. If it was not merely voidable, but absolutely void *ab initio*, a different question would be presented. But being a subsisting judgment by a court of competent jurisdiction, and not a mere nullity, the *fieri facias* clothed the marshal with authority to sell, and if the judgment had afterwards been in fact reversed, the title of the purchaser would not thereby have been defeated. The law will not permit even the party himself, who has suffered his land to be sold under an erroneous judgment, to disturb the title of a *bona fide* purchaser, by afterwards procuring the judgment to be reversed. If it was otherwise, there would be no security to purchasers, and writs of execution would be of little effect, as few would incur the risk attending such purchases.

The objection to the return of the *fieri facias*, stands on no better ground. It is true that the return does not set out the name of the purchaser, and that no description is given of the property sold, for which reason it might perhaps have been set aside on motion. But it is not the return of the officer that gives title to a purchaser, but the

previous sale; which was decided by this court in the case of *Boring's Lessee vs. Lemmon*, 5 Harr. & Johns. 223. And it would be of dangerous consequence to *bona fide* purchasers, if after having paid their money for property sold under competent and legal authority, they should be at the mercy of officers who might make imperfect returns of executions, or if they pleased make no returns at all. But a sheriff's sale of land being within the statute of frauds, some memorandum in writing is necessary to be made. It is therefore always right and proper, for the security and protection of purchasers, that in addition to a deed for the land sold, there should be a special return of the execution, particularly describing the premises, and setting out the name of the purchaser, either of which, though not operating to pass the title, would be safe and competent evidence of the sale.

In this case the sale by the marshal was of the specific property condemned according to the act of assembly, for which he passed his deed to the lessor of the plaintiff, containing a sufficient description of the premises sold.

JUDGMENT AFFIRMED.

BEALL'S LESSEE vs. HOLMES.

JUNE.

APPEAL from *Montgomery* county court. Ejectment for a tract of land in *Montgomery* county, called *Lay Hill*. The defendant, (the appellee,) pleaded the general issue. The opinion of the court below was given on a case stated, which presented but one question, that is, what was the true construction of a devise in the will of *James Beall*, executed in the year 1723, under which the lessor of the plaintiff claimed? The county court, [*Ridgely* and *Kilgour*, A. J.] decided, that the devisees took an estate for life only, and gave judgment for the defendant, and the plaintiff appealed to this court. The devise is sufficiently recited in the opinion delivered by this court.

D, that part of a tract of land called," &c. Item. I give and bequeath to my sons E and F, all that tract of land called *Lay Hill*, to be equally divided betwixt them. Item I give and bequeath to my son G, part of a tract of land called," &c. "Item. I give and bequeath to my daughter H, part of a tract of land called," &c. He gives her also 30*l*. sterling, and bequeaths 10*l*. sterling a year to a minister. "Item. I give and bequeath to my loving wife I, three negroes, viz." &c. "and my now dwelling plantations during her natural life. Item. I give and bequeath all the rest of my personal estate, viz. goods, chattels and negroes, to be equally divided amongst my children."—*held*, that E and F took a life estate only in the tract of land called *Lay Hill*.

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A by his will having the following introductory clause, "As touching my worldly estate wherewith it has pleased God to bless me in this life, I give, devise and dispose of, in the following form and manner, viz." devised and bequeathed as follows: "In primis I give and bequeath to my eldest son B, all that tract of land called," &c. "Item. I give and bequeath to my son C, all that tract of land called," &c. "Item. I give and bequeath to my son

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The cause was argued at the last June term before
BUCHANAN, EARLE, MARTIN, DORSEY, and STEPHEN, J.

Jones and Key, for the Appellant, enumerated the several clauses in the will of *James Beall*, on which they relied, and which are particularly set forth in the opinion delivered by the court, and stated that the question was, whether the devisees under the will took an estate in fee or for life. They contended, that the intent of the testator was to be gratified, if it sufficiently appeared from the will, and that the intent to give a fee was manifest from the whole will. 1. From his reciting in the preamble that he meant to dispose of all his estate. 2. From the concluding bequest of all the rest of his *personal estate*, showing that he had disposed, (as he believed,) of all his *real estate*. 3. From his omitting words of inheritance in all the devises to his children, even in that to his eldest son. 4. From his inserting words of limitation in the devise to his wife—showing, that where he gave generally he meant to give in fee, and that where he meant to give for life, he thought it necessary to limit the estate by express words. The authorities to which they referred, and those also relied on by the counsel for the appellee, being noticed and commented upon in the opinion delivered by the court, it is unnecessary to notice them here.

T. B. Dorsey, (Attorney General,) and *Magruder*, for the Appellee.

Curia ad. vult.

BUCHANAN, Ch. J. at this term delivered the opinion of the court. It appears that on the 21st of November 1723, *James Beall* made his will, in which, immediately after an introductory clause in these words, "as touching my worldly estate wherewith it has pleased God to bless me in this life, I give, devise and dispose of, in the following form and manner, viz." he proceeds, "*Imprimis*, I give and bequeath to my eldest son *John Beall*, all that tract of land called *Rover's Content*, and another tract of land called *Fiffe*, and all that part of a tract of land called *Good Luck*; which lies on the east side of the Cabin Branch; and another tract of land called *Drumaldree*. Item. I give and bequeath to my son *Nathan Beall*, all that tract of land called *Easy Purchase*, and a tract of land thereunto adjoining, called *Addition to Easy Purchase*. Item. I give

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and bequeath to my son *James Beall*, that part of a tract of land called *Good Luck*, which lies on the west side of Cabin Branch, and a tract of land called *Lonehead*. *Item*. I give and bequeath to my sons *Robert Beall* and *Joseph Beall*, all that tract of land called *Lay Hill*, to be equally divided betwixt them. *Item*. I give and bequeath to my son *Zephaniah Beall*, part of a tract of land called *Allison's Park*, and another tract of land called *Cooper*. *Item*. I give and bequeath to my daughter *Sarah Beall*, part of a tract of land called *Beall's Manor*." He gives her also £30 sterling, and bequeaths £10 sterling a year to a minister, and then goes on—" *Item*. I give and bequeath to my loving wife *Sarah Beall*, three negroes, viz. *Dogon*, *Hocketty* and *Peak*, and my now dwelling plantation, during her natural life." and adds a residuary clause in these words: " *Item*. I give and bequeath all the rest of my personal estate, viz. goods, chattels and negroes, to be equally divided amongst my children." That *James Beall*, the testator, died seized in fee simple of all the lands mentioned in the will, and that *John Beall*, one of the devisees, (under whom the defendant claims,) was his heir at law. And the question is, whether *Robert Beall* and *Joseph Beall* took an estate for life or in fee in the tract of land called *Lay Hill*?

It is an established rule of law, "that express words of limitation, or words tantamount, are necessary in a devise to pass an estate of inheritance." But in the construction of a will, the intention expressed by the testator, to be collected from the whole instrument, by comparing and considering the different parts together, if it be consistent with the rules of law, in relation to the nature and operation of the estate devised, must prevail, giving effect, if possible, in the exposition, to all the words of the will; and being supposed to be made when the testator is *in extremis*, and *inops concilii*, it is not necessary that technical terms, or any particular form of words, should be used to convey his meaning. Upon this principle it has long been settled, that the word "*heirs*" need not be used in a will to create an estate in fee, but that any other words, which sufficiently show the intention of the testator, to give to the devisee the whole of his interest in the thing devised, will have the same effect; as a devise to one in fee simple, or for ever, or to a man and his successors, or his blood, or to a person ge-

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nerally to give and sell, &c. which he could not do without having a fee in the land.

An "estate in land," is defined to be "such interest as the tenant hath therein." 2 *Blk. Com.* 103. Hence it is settled by an uninterrupted series of adjudications from an early period of juridical history down to the present day, that the word "*estate*," in a devise, is equivalent to words of limitation, and sufficient to pass the fee simple, when not restricted by other words, nor appearing to be used by the testator, as descriptive only, of the local situation of the land devised; and so (upon the same principle,) will any other words having the same import. But though the intention of the testator is to govern in the construction of a will, yet that intention must, in the language of Mr. Justice *Wilnot*, in *Baddeley vs. Leppingwell*, 3 *Burr.* 1541, be collected "*ex visceribus testamenti*;" it must be gathered, not from what he has *omitted to say*, but from the words which he *has used*, and when so ascertained, and not otherwise, shall prevail, if there be also found in the *viscera* apt words to effectuate it. Upon this same principle of giving effect to the intention of a testator, manifested by the expressions contained in his will, it is now well settled, that a general devise of land, charged with a gross sum, or with debts and legacies, to be paid at all events by the devisee, and not out of the rents and profits, will pass the fee; on the ground, that the devise being intended for the benefit of the devisee, the testator must have meant to give him such an estate as he could not lose by; and therefore, as, if he should chance to die before he received from the land what he had paid, he would be a loser, it was clearly the intention of the testator to give him *more* than an estate *for life*, which, there being no words of restriction, could only be a fee simple. So also will a general devise of land, with a charge upon the devisee of the payment of a perpetual annual sum, or of an annuity for the life of the annuitant, &c. In the first case, because the charge being perpetual, the testator must have intended the fund to be perpetual also, and consequently meant to give the fee; and in the latter, because the annuity being of uncertain duration, requires an estate in fee to support it; and every devise being intended for the benefit of the devisee, the testator must in such a case necessarily mean to give him the inheritance. Upon the same ground of intention, it has

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been held, that if there be a devise of land to one generally, with remainder over upon a limited contingency, as upon his dying under the age of twenty-one years, the first devisee will take an estate in fee simple, upon the principle, as said, that the devise over being limited only upon the contingency of his dying during his minority, the necessary implication is, that he intended to give him an absolute estate in fee, if he should attain his full age. But an heir at law can only be disinherited by express words or necessary implication, his title being founded on the law, (which is certain,) and cannot therefore be defeated by conjecture. Hence it is, that a devise of land, without words of limitation, or any other words being added, from which an intention to give an estate of inheritance can be clearly collected, passes only a life estate to the devisee, such a general devise importing *in law* an estate for life. Upon some one or more of these principles, the different cases in the books will be found to have turned, where the question has been whether a devisee took an estate of inheritance, or for life only. And in construing wills, though there are scarcely two in which the same expressions are used, yet regard should always be had to general rules of construction, established by adjudged cases.

In the case before us, it has been contended with much zeal, and great ingenuity, that *Robert Beall* and *Joseph Beall* took an estate in fee simple, under the devise to them, of the tract of land called *Lay Hill*, upon the principle, that the intention of the testator, to be collected from the whole of the will taken together, must prevail; and the main argument is founded upon the introductory clause of the will, "as touching my worldly estate, wherewith it has pleased God to bless me in this life, I give, devise and dispose of, in the following form and manner, viz." the devise to *Robert* and *Joseph Beall*, being a naked *general* devise of all that tract of land called *Lay Hill*, to be equally divided between them, without any words of limitation or any other words added—on the ground that the introductory clause manifests an intention in the testator to have disposed of the whole of his estate; but it will be seen, on examination, that the argument drawn from the introductory clause alone, is not sustained by the *English* authorities. Where there are words in a devise, which would be

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sufficient to carry a fee, if it was the intention of the testator to give one, but which intent does not clearly appear from the words themselves, then if there be an introductory clause, it may be resorted to, to explain their meaning; and if it manifests an intention in the testator, at the time of making his will, to dispose of the whole of his estate, the words in the subsequent operating clause, which otherwise would be of doubtful meaning, and consequently not sufficient to carry a fee, shall be taken in that sense which accords with his intention before expressed in the introductory clause, and will pass the inheritance, and thus effect will be given to all the parts of the will. So far have the *English* tribunals gone, and no further. For instance, (and it is put only as a single example,) if there be expressions in the residuary clause of a will, such as "testamentary estate," &c. which are applicable either to real or personal property; and are not restricted in the devise to the personalty, but may include both, and it would be *doubtful* on the residuary clause alone in what sense they were used by the testator; the introductory clause, if there be one, showing that he meant to dispose of the whole of his property, may be called in aid of the interpretation, and they shall be taken in the largest sense, so as to include the real property. Where the introductory clause of a will shows that the testator intended to dispose of the whole of his estate, the subsequent words will, if possible, be so construed as to pass the fee simple, in order to effectuate his intention not to die intestate as to any of his property; but they must be such words as would of themselves be in law sufficient to carry a fee, if used by the testator with that intent, the office of the introductory clause being only to show the intent with which they were used; and if no words can be found, out of the introductory clause, which the law considers sufficient to pass the fee, when used by a testator for that purpose, the rule of law, "that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance," must prevail, and the devisee can only take an estate for life, no matter what conjecture or private opinion may be, which is no ground for a judicial determination; for the heir at law must inherit, unless the estate be given to somebody else by express words or necessary implication. A general devise of land, without words of limitation, or any other words being ad-

ded, imports in law an estate for life in the devisee; there is nothing on which a judicial doubt can arise, but a strict and absolute legal certainty. In such a case, there being nothing open for construction and requiring explanation, it matters not what was the intention of the testator, having omitted to use apt words to effectuate that intention; and an introductory clause, showing that he had the whole of his estate in view when he made his will, being only a manifestation of what he intended to do, and not the operating clause, cannot of itself be sufficient to control a settled rule of law, and pass the fee simple.

In the case of *Cole vs. Rawlinson*, 1 Salk. 234, (1st Ann,) the words of the devise were, "I give, ratify and confirm, all my estate, right, title and interest, which I now have, or may have in my power to dispose of, after my death, in whatever I hold by lease from Sir John Freeman, and also the house called the *Bell Tavern*, to John Billingsley"—And it was held by three judges, against Holt, Ch. J. that being but one sentence, the preposition "in" related as well to the "*Bell Tavern*" as to the leasehold estate, and that the fee simple in the "*Bell Tavern*" passed to the devisee by force of the words "estate, right, title, and interest." Holt did not deny the sufficiency of the words "estate," &c. to pass a fee in a devise, but thought the preposition "in" related only to the leasehold property. In *Bridgewater vs. Bolton*, 1 Salk. 236. (2d Ann,) a fee was held to pass by the word "estate;" and per Holt, the word "estate" is *genus generalissimum*, and includes all things real and personal.

These cases are adverted to, not because they are supposed to have any immediate bearing upon that under consideration, but because they, and others which it is unnecessary to cite, serve to show how far back the word "estate" in a will was held to be sufficient to pass a fee; and will thus assist in the understanding of the grounds on which later cases have been decided.

In *Tanner vs. Wise*, 3 P. Wms. 294, there are the introductory words, "as to all my temporal estate with which it has pleased God to bless me, I dispose of the same as follows;" and then, after giving some pecuniary legacies, &c. follows this residuary clause, "all the rest of my estate, goods and chattels whatsoever, real and personal, I give to my beloved wife, whom I make my executrix;" and

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it was decreed by Lord *Talbot*, that the devisee took an estate in fee simple in all the testator's real estate, on the ground that the words "temporal estate," in the introductory clause, signified the same as "worldly estate," or all that a man has in the world, and consequently took in both real and personal estate, and that the word *rest* being a relative term, it meant the rest of his "temporal estate." Thus resorting to the introductory clause to ascertain the sense in which the word "estate" was used by the testator in the residuary devise; and as it appeared that he intended to dispose of all he had, the word "estate" was taken in its largest sense, so as to cover the real as well as the personal estate; the question being not as to the legal effect of the word "estate," but only whether the testator meant to apply it to his real property, leaving it (if he did so intend,) to its operation in law. In *Ibbetson vs. Beckwith*, *Cases temp. Talb.* 157, there is this introductory clause, "as touching my worldly estate, wherewith it has pleased God to bless me, I give, devise, and dispose of the same, in the manner following;" and then after other devises, follows this: "*Item.* I give unto my loving mother all my estate at *Norwith Close*, *North Closes*, and my farm held at *Roomer*, with all my goods and chattels as they now stand, for her natural life, and to my nephew *Thomas Dadson*, after her death, if he will but change his name to *Beckwith*," &c. The only question raised was on the effect of the word *estate*, which was held to pass the fee to *Thomas Dadson*.

The principle of that case is, that all the parts of a will ought to be taken together, and that where it appears from the introductory clause, that the testator intended to dispose of all he had, (as it did there,) if there are words in a subsequent devise which may carry a fee, they shall be considered as used by the testator with that intent, and will be held to pass the inheritance. With respect to the words "and my farm held at *Roomer*," no question appears to have been raised upon them, nor does it appear from the case, as reported, that that farm formed any part of the matter in dispute; no argument therefore can be drawn from the use of those words in that will.

In *Grayson vs. Atkinson*, 1 *Wilson's Rep.* 333, the introductory clause of the will is the same as in *Tanner vs. Wise*, 3 *P. Wms.* 294, "as to all my temporal estate where-

with it hath pleased God to bless me, I give and devise the same as follows;" and after several pecuniary legacies being given, with directions for "selling all or any part of the real and personal estate for the payment of debts and legacies," comes the residuary clause, in these words, "as to all the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements, &c. I give to the said A." Lord *Hardwicke* decided, that A took a fee; that the testator, by the words "as houses, gardens, tenements," &c. explained what he meant by the words "goods and chattels, real and personal, moveable and immoveable," which he said, without such explanation, would not have carried a fee; that from his directing all, or any part of his estate, to be sold for the payment of debts and legacies, it appeared he had it in view to dispose of the whole; that the words "as to all the rest," plainly related to something mentioned before, that he was about to dispose of, which was all his *temporal estate* mentioned in the introductory clause, and which was sufficient in law to pass a fee, when the testator had one.

The ground of the decision, therefore, was, that the words of the residuary clause meant all the rest of the testator's *temporal estate*; and the Lord Chancellor, by the expression to be found in his argument "for intention at first is one thing, and the execution of that intention is another," negatives the idea of an introductory clause, showing the intention of a testator to dispose of all he has, being alone sufficient to pass a fee, if there are no words in the devising clause that may in law carry it.

In *Frogmorton vs. Holyday, 3 Burrows*, 1618, after the introductory clause, "as for all my wordly affairs and estate, &c. I do dispose thereof in manner following," the testatrix devised an estate in fee to her eldest son, and then devised to her son *John* "all that house and garden in the tenure and occupation of *Edward Gibson*," charged with an annuity payable out of the rents and profits, with a limitation over to her three daughters, if *John* should chance to die in his minority.

In construing this devise, the court took into consideration every part of the will, including the introductory clause, in order to ascertain what the testatrix meant by the devise over, and decided, that *John* took an estate in fee simple, not by force of the introductory clause, but by

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reason of the limitation over, on the ground, that the introductory clause, and the other parts of the will taken together, showing clearly, that the testatrix did not intend to die intestate as to any part of her estate; the limitation over only upon the contingency of his dying during his minority, proved that she meant the heirs at law should not have it, and furnished the necessary implication, that she intended to give to *John*, the devisee, an absolute estate in fee, if he should attain his full age. It was the devise over, therefore, that worked the effect of giving the inheritance to the devisee, and not the introductory clause; and if there had been no such devise over, the rule of law must have prevailed, for it was upon that, that the decision turned. The case of *Hogan vs. Jackson, Couper*, 299, turned upon the meaning of the word "effects" in the residuary clause of the will, in which the testator gave to his mother "all the remainder and residue of all the effects, both real and personal, which he should die possessed of," and it was held by the court, that "effects" was synonymous to property, that "real effects" meant real property, and that real and personal effects were synonymous to substance, which included every thing that could be turned into money, and consequently, that under the residuary clause, the devisee took a fee in all the fee simple estates of the testator. The introductory words, with all the other parts of the will, were considered by the court, for the purpose of ascertaining what the testator meant by the word "effects," that is, to what description of property he meant to apply it, whether to real or personal, or to both, but no farther. And Lord *Mansfield* said, "that introductory words could not vary the construction of a devise, so as to enlarge the estate of a devisee, unless there were words in the devise itself sufficient to carry the degree of interest contended for."

In *Loveacres vs. Blight, Couper*, 352, where the devise, on which the question arose, was in these words, "Item, I give unto *John Mudge* and *Robert Mudge*, my two sons, &c. all and singular my lands and messuages, by them freely to be possessed and enjoyed alike," the court reasoned from the introductory clause, and other parts of the will, to show what was the intention of the testator; but after stating "that though the introduction of a will, declaring that a man means to make a disposition of all his

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Worldly estate, is a strong circumstance, connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee where he has used no words of limitation, it will not do alone," decided, that the devisees took an estate in fee, on the ground, that by another clause the estate was charged with a life annuity to be paid by them; "on the principle, that where any thing is directed to be done, which, strictly speaking, an estate for life may not be sufficient to answer, the court will imply a fee."

The case of *Baker vs. Stocker*, 5 Term Rep. 13, was decided upon the same principle. After the words, "as touching all such temporal estate of lands, goods and chattels, as God hath endowed me with, I give and bequeath thereof as followeth," the testator devised to his grandson, *John Baker*, his dwelling-house, &c. paying yearly and every year, out of the said dwelling-house, the sum of 15s. unto his grand-daughter *A. Halstaff*;"—and the court, after declaring that the introductory words would not of themselves have carried the fee, ruled, that as the annuity was intended to continue during the life of the annuitant, the devisee must of necessity take an estate in fee.

In *Smith vs. Coffin*, 2 Hen. Blk. 444, the question arose upon the meaning of the word "testamentary" in the sweeping residuary clause of the will, in which the testator gave to his wife "all the rest and residue of his goods, chattels, rights and credits, personal and testamentary estate whatsoever, wheresoever, and in whose hands soever, not before particularly given and bequeathed"—It was a question entirely upon the construction of words; and in every such case the introductory clause may well be resorted to for assistance in the interpretation, not to control or vary their import in relation to the subject matter to which they are in fact applied, but to find out, if possible, to what description of property the testator intended to apply them; and if they are not exclusively applicable to personal property, but may include real property, and it appears from the introduction that the testator intended to dispose of his whole estate, it is evidence that he used them in their largest and most comprehensive sense, and they will be so taken, and be held to pass a fee, if they are sufficient in law to carry it, but not otherwise. And upon this principle the court proceeded in that case—they held, that the

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word "testamentary" was as well applicable to real as to personal property; and as the introductory clause showed that the testator intended to dispose of all he had, they concluded that he meant to apply it to both; and being coupled with the word "estate," which, (when unrestricted by other words,) is *per se* sufficient to pass a fee, they ruled that the devisee took a fee simple in the premises in question under the residuary clause. The wills in the following cases, referred to in argument, have no introductory words to assist in the interpretation: In *Baddeley vs. Leppingwell*, 3 Burrows, 1533, it was decided, that the devisee took a fee simple under a general devise of lands to her, "she paying thereout forty shillings a year to her sister." The court took a view of the whole will, and drew the conclusion, from its different provisions, that the testator intended to dispose of the inheritance in the premises in question; but founded their judgment not on that general intent, but expressly on the ground that there was an annuity charged upon the property, for the life of the annuitant, which required a fee to support it, and that therefore the testator must have intended to give one.

In *Wigfall vs. Brydon*, 3 Burrows, 1895, the testator devised a house and stable, worth only one hundred pounds, first to her husband for life, then to her brother for life, and then *generally* to seven children, with directions if her brother should die before her husband, that they should be divided amongst the children. The plaintiff, who claimed as heir at law, was nonsuited, and the court said there was enough upon the whole will to show that the testatrix intended the value of the house and stable should be divided among the seven children. And in *Denn vs. Gaskin*, Cowper, 659, Lord Mansfield, who decided the case of *Wigfall vs. Brydon*, says, "the ground the court went upon in that case was, that from the nature of the estate, and the words used by the testatrix, they amounted in fact to a direction to sell the estate and divide the produce of it."

In *Goodright vs. Allin*, 2 W. Blk. 1041, the devisee was held to take an estate in fee on the two grounds expressly taken by the court—1st. That there was an annuity charged upon the property for the life of the annuitant, to be paid by the devisee, which required a fee to support it; and 2d. That the payment of the debts and le-

gacies were charged on the real, as well as the personal estate. The substance of the case of *Tofield vs. Tofield*, 11 East, 246, is, that where a testator calls his real property, personal property, and devises it by that description, it may pass.

In *Shell vs. Pattison*, 16 East, 221, the devise was of all the remainder of the testator's stocks, "with his freehold property," and the question turned upon the effect of the word "property"—the court held that it was synonymous to effects, which was in law sufficient in a will to pass a fee; that it was clearly used by the testator not as descriptive only of the thing, but of the quantum of his interest in it, and therefore decided that the fee passed to the devisee.

The principle contended for by the counsel for the appellant is, that whenever, from the introductory clause of a will, or any other parts of it, the mind can be satisfied that the testator had in view a disposition of the whole of his property, the fee simple shall pass, under a general devise of land, without any words of limitation, or any other words being added, which, when applied to real property, are in law sufficient to carry a fee. But not one of these cases goes the length of sustaining any such principle; neither of the wills, in the five last cases, had any prefatory words showing the object of the testator. The first, *Baddely vs. Leppingwell*, was decided on the ground that there was an annuity charged upon the estate for the life of the annuitants. *Wigfull vs. Byrdon*, on the ground that the devise amounted, in fact, to a direction to sell the property and divide the proceeds. *Goodright vs. Allen*, on the ground that there was an annuity for the life of the annuitant charged upon the property, to be paid by the devisee, and also that it was charged in the hands of the devisee with the payment of the debts and legacies. *Tofield vs. Tofield*, on the ground that the testator manifestly intended, by the words he used, to include his real property; and *Shell vs. Pattison*, on the ground that the word "property" is equivalent to the word "estate," and when applied to real estate sufficient *per se* to pass the fee. In the other class of cases, all the wills had introductory words, showing that the respective testators had in view the whole of their property, but in neither of them were introductory words held to be sufficient to give to a general devise,

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without words of limitation, the effect to pass an estate in fee. But they were all decided on very different principles. *Tanner vs. Wise*, *Ibbetson vs. Beckwith*, and *Grayson vs. Atkinson*, on the ground that the word "estate," when applied to real property in a devise, and not used as a description only of the specific land, but denoting the quantum of interest or property that the testator has in the land devised, is of itself sufficient to carry a fee. *Frogmorton vs. Holyday*, on the ground that a devise to one generally, with a limitation over on the contingency only of his dying during his minority, gives a fee to the first devisee. *Hogan vs. Jackson*, on the ground that the word "effects" being synonymous to *substance* or *property*, when applied in a devise to *real estate*, is of itself sufficient to pass a fee. *Loveacres vs. Blight*, and *Baker vs. Stocker*, on the ground that a general devise of land charged with an annuity for the life of the annuitant, passes the fee. And *Smith vs. Coffin*, on the ground that the words "testamentary estate" being applicable as well to real as to personal estate, are, when applied in a devise to real property, sufficient to carry the fee. In *Tanner vs. Wise*, *Ibbetson vs. Beckwith*, *Grayson vs. Atkinson*, *Hogan vs. Jackson*, and *Smith vs. Coffin*, the prefatory words were taken into consideration, not because of any effect they were supposed to have in passing the fee, but as auxiliaries only, helping to show to *what* the respective testators intended to apply the operative words, in the devising clauses. And in *Frogmorton vs. Holyday*, *Loveacres vs. Blight*, and *Baker vs. Stocker*, only to strengthen the necessary implication arising in the first, from the limitation over, and in the two last, from the charge of a life annuity.

In *Frogmorton vs. Wright & Kershaw*, 3 *Wilson's Rep.* 414, and 2 *W. Blk.* 889, (the same case,) the prefatory words of the will were, "as touching the disposition of my temporal estate, as it hath pleased God Almighty to bestow upon me, I give and dispose thereof, as followeth:" and the particular devise upon which the question arose was in these words, "Item, I give unto *William Wright*, my nephew, two houses, at *Seacroft*, with a croft and appurtenances belonging to them, now in the occupation of *John Carter* and *Elizabeth Thornton*." There was also a bequest of five shillings a year to the testator's brother and heir at law. The judgment of the court was, that *Wil-*

liam Wright, the devisee, took only an estate of life; and the chief justice, *De Grey*, in delivering the opinion, said "it may seem probable, that the testator's intention was, that his nephew *William* should have a fee, but it is a clear rule that there must be express words, or a necessary implication to disinherit the heir at law; neither of these appear in the present case, and therefore the legal operation of the words of the will must govern."

In *Callow & others vs. Bolton*, 2 *W. Blk.* 1045, the testator gave all his real and personal estate to his wife for life, and then at or immediately after her death, devised to his son *Paul*, generally, "all that his land lying and being in *Dudley*;" and gave to his grandchildren, who were his heirs at law, five shillings each. The question was, whether *Paul* took an estate for life or in fee. And the court said, "there was nothing in the case to exempt it from the general rule of law, which declares, that a gift to a man of lands, without expressing for what estate, vests only an estate for life;" and therefore decided, that he took only a life estate. This case is cited in *Right vs. Sidebotham*, *Doug. Rep.* 759, and there the introductory words are stated to have been "as touching such worldly estate, where, with it hath pleased God Almighty to bless me with."

In *Denn vs. Gaskin*, 2 *Cowp.* 657, immediately after the words, "as to all such worldly estate as God has endued me with, I give and bequeath as follows," the testator devised "all that his freehold, messuage and tenement, lying in *Gaitsgill*, in the parish of *Dalston*, together with all houses, barns, orchards, edifices, and appurtenances whatsoever, reputed as part thereof, or belonging to the same, unto *Matthew Robinson*, *George Robinson* and *Thomas Robinson*, equally to them, my sister's sons." He then bequeathed ten shillings to his heir at law; and in the residuary clause bequeathed "all the rest of his goods, chattels, and personal estate whatsoever," without mentioning any real property, to *Matthew*, *George*, and *Thomas Robinson*. Lord *Mansfield*, and the other judges, declared their belief, and argued from the disinheriting legacy to the heir at law, and the bequest in the residuary clause of all the testator's personal property, without any notice being taken of any real estate, to show that he intended to give to *Matthew*, *George*, and *Thomas Robinson*, a fee simple in the premises devised to them; but said there were no words to

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be found in the will to take the case out of the rule of law, and decided that they took only an estate for life. *Aston*, Justice, cited the case of *Wright vs. Russel*, in which, after the preamble, "as touching the disposition of all such worldly estate, as it hath pleased God to bestow upon me, I give, &c.," the testator devised a house to his grandson *Henry*, and after his decease, to his two sons *Thomas* and *William*, and then gave one shilling to the husband of the heir at law, and *Thomas* and *William* were held to take an estate for life; and Lord *Mansfield* added, that though the intention is ever so apparent, the heir at law must of course inherit, unless the estate is given to somebody else. This is a strong case, and cited and much relied upon as authority in some of the subsequent cases.

In *Right vs. Sidebotham*, *Douglas*, 759, the testator, after the words, "for those worldly goods and chattels, wherewith it has pleased Almighty God to bless me, I give and dispose in manner following," gave to his sister and heir at law one shilling; and after some other bequests, devised certain lands to his wife, her heirs and assigns, for ever, and added, and "I give and bequeath to my loving wife aforesaid, *all my lands, tenements and houses*, lying in the parish, &c. to wit, *the house I now live in*, with the *yard, garden and outhouses*, and *all other appurtenances thereunto belonging*." The question was, what estate did the devisee take in the last mentioned premises? And it was adjudged, that she took only an estate for life. Lord *Mansfield* declaring he had no doubt that the testator's intention was to disinherit the heir at law, but that the rule of law was established and certain.

In *Child & Wife vs. Wright & others*, 8 Term Rep. 64, it appears that the testator had three grandsons, *James Wright*, *John Wright*, and *James Camper*. After the prefatory words, "as touching such worldly and personal estate wherewith it has pleased God to bless me in this life, I give, devise, and dispose of the same, in the following manner," he devised all his estate, real and personal, to his wife, for life, and after her death, devised to *James Wright* all his "lands," freehold, copyhold and leasehold, in the county of *Essex*. He also devised to *James* all his "estate," freehold and copyhold, lying in *Huntingdonshire*. To *John* he devised all his "estate," land, &c. called the *Coal Yard*, &c. and to *James Camper*, who was the heir

at law, he devised the house he lived in, together with other houses and lands by name.

The devise to the heir at law was general, without any words of limitation; that to *John Wright* had the word "estate;" the first devise to *James Wright* was general of his lands in *Essex*, without any words of limitation, and the second was of his "estate" in *Huntingdonshire*. The only difference between the two devises to *James Wright* was, that in one the word "lands" was used, and in the other the word "estate," and the question was, whether he took an estate in remainder, after the death of the widow, for life or in fee, in the lands in *Essex*, under the first devise? Indulging private conjecture, it would seem that the testator meant in each devise to give the same quantum of interest, without imagining any difference in the legal effect of the words "land" and "estate," but used them as synonymous terms, and that the devisee ought to take accordingly; and from the introductory clause it was manifest that the testator intended to dispose of the whole of his estate. But the word "land" denoting only the kind of property devised, and not the quantum of the testator's interest in it, and therefore not being sufficient in law to pass a fee, the court, bound by the established rule, decided that the devisee took only an estate for life.

In *Doe vs. Allen*, 3 Term Rep. 497, the introductory words of the will are, "as to what real and personal estate it has pleased Almighty God to bless me with, I give and dispose of the same as followeth;" and after some directions respecting payment of debts and funeral expenses, the testator devised all his messuages, lands, tenements and hereditaments whatsoever, situate, lying, &c. without any words of limitation, to *William Allen*, to whom, after some specific legacies to another, he also gave, in the residuary clause, all the rest of his personal estate, making no mention of any real property; and it was held, that *William Allen* took an estate for life only in the premises devised to him. The question in *Doe vs. Child & wife*, 4 Bos. & Pull. (1 New Rep.) 335, arose upon the same will and the same clause, (though for a different part of the property devised,) on which the question in *Child & wife vs. Wright & others*, 8 Term Rep. 64, was decided, and the same decision was made.

In *Doe vs. Clarke*, 5 Bos. & Pull. (2 New Rep.) 343, the

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testator, after the words, "as to that wordly estate wherewith it hath pleased God in his kind providence to entrust me, I dispose thereof in the following manner," devised to his wife for life certain houses and appurtenances in *Swan Lane*, and made a general devise, without any words of limitation, of a part of the same premises to his son *William*, after the death of his wife; there were also general devises of other real property, without words of limitation, to the heir at law, and another remaining son. The question upon that will was, whether *William* took an estate in remainder in fee, or for life, after his mother's death, in the premises so devised to him? And it was held, that he took only a life estate. And in *Drewry vs. Barron*, 11 *East*, 220, Lord *Ellenborough* said, "they were tied down by a positive rule of law, that in the devise of real property, where there are no words of limitation, and no necessary implication from the words of the devise to give a larger estate, the devisee can only take an estate for life." In that case, the testator, after the words "as touching such wordly estate wherewith it has pleased God to bless me in this life, I give, devise, and dispose of the same, in the following manner and form," gave to his brother and his heirs a cottage-house, and then devised to his wife "all and singular his lands, messuages and tenements, by her freely to be possessed and enjoyed," without any words of limitation. The judges thought that it was the intention of the testator to give to his widow an estate in fee, but because there were no words of limitation added to the devise, determined that she took an estate for life.

In all these cases the introductory words, aided in some of them by disinheriting legacies to the heir at law, in others by general devises without limitation, to the heir at law, in one by the circumstance of the sweeping residuary clause being confined to personalty, and in another by both a similar residuary clause and a disinheriting legacy to the heir at law, were made to yield to the rule of law; and they go most clearly to show, that the rule is imperative, and must prevail, where no words are to be found in a devise to control it, or take the case out of it. The intention of the testator is in every case to be consulted, and must govern the construction of the will, when there is any thing open to construction; but when the words of the devise have a fixed and definite meaning, and import in law

an estate for life, the introductory clause, showing that he meant to dispose of all his property, cannot enlarge it to an estate in fee.

It has also been contended, in addition to the argument drawn from the prefatory words in this case, that the circumstance of there being a devise of lands to the eldest son and heir at law, and which, together with the devises to the other children, is of the same character with that in question, furnishes evidence that the testator intended to give an estate in fee to each, and that the residuary clause, containing only a bequest of personal property, proves that he supposed he had done so. But those circumstances, either alone, or when taken together, with an introductory clause manifesting the intention of the testator to make a disposition of the whole of his property, are not conceived to be sufficient to control the rule of law.

In *Child & wife vs. Wright & wife*, *Doe vs. Child & wife*, and *Doe vs. Clarke*, there were general devises of land, without words of limitation, to the respective heirs at law, as in this case, and in *Doe vs. Child & wife*, thought by Sir James Mansfield to be an imposing circumstance. In *Denn vs. Gaskin*, and *Doe vs. Allen*, there were sweeping residuary bequests of personal property only, as here, which in *Doe vs. Allen* was urged by counsel in argument as a strong circumstance. And in *Frogmorton vs. Wright, Callow & others vs. Bolton*, *Doe vs. Gaskin*, *Wright vs. Russell*, and *Wright vs. Sidebotham*, there were disinheriting legacies to the heirs at law, from which quite as strong an argument might be drawn as from a general devise to the heir at law, without words of limitation; and in each of the cases of *Wright vs. Russell*, *Child & wife vs. Wright & wife*, *Doe vs. Child & wife*, and *Doe vs. Allen*, there was the strong additional circumstance, that the devise in question was a limitation over, after an estate for life. Besides, it is apparent in this case that the testator could not have supposed that he had disposed of his entire interest in the whole of his property; because the devise to his wife of his dwelling plantation is expressly for life, and no disposition is made of the reversion. It would seem too, speaking from conjecture, that parts of two other tracts of land are not given to any body; for he devises to *Zephaniah Beall*, part of a tract of land called *Allison's Park*, and to *Sarah Beall* part of a tract of land called *Beall's Manor*,

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without taking any notice in his will of the other part of either of those tracts.

These things, though they are not mentioned as governing the decision of this court, yet they certainly weaken the argument in favour of a fee, drawn from the supposed intention of the testator to dispose of the whole of his estate; and entirely negative the idea, that from the circumstance of the residuary clause containing only a bequest of personal property, he supposed he had before parted with all his interest in his real estate. Since it is manifest, on the face of the will, that he knew he had not disposed of the reversion in the dwelling plantation, having expressly given to his wife an estate for life only, in that tract of land, and hence the construction contended for, though it should prevail, would not gratify the supposed intention to dispose of the whole interest. The mistake here, has been in the application of the principle, that the intention of the testator shall prevail. It shall prevail in expounding words in a devise of dubious import, as to the subject matter to which they relate; as, if the question be, whether they include real property, or are applicable only as used to personalty, it shall prevail in determining the question, whether the words of the devise denote only the specific thing or land devised, or whether they denote the quantum of the testator's interest therein; it shall prevail whenever the testator makes use of words in the devise, sufficient in law to effectuate it, when the words of the devise may in law carry a fee.

The true and safe rule of construction is, that the whole of the will shall be taken together to find out what was the object and intention of the testator at the time of making it, which, where it clearly appears, (no matter how irregularly expressed,) ought to prevail, if when applied to the subject matter of the devise there are found apt or sufficient words in law to effectuate that intention.

The *Virginia* decisions, which are entitled to great respect, are the other way, there the principle has been differently applied, and the rule of law made to yield to the general intention of the testator, which has alone been held sufficient to carry a fee without any words in the devise, which in law would bear it. *Kennon vs. M. Roberts*, 1 *Wash. Rep.* 96, was not decided on that ground, the case having gone off on another point; but the court very

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broadly expressed the opinion, that the word "estate," used in the introductory clause alone, might be transposed to the devising clause, so as to enlarge the interest devised, from a life estate, according to the legal import of the words of the devise, to an estate in fee. *Davis vs. Miller*, 1 Call, 127; *Watson vs. Powell*, 3 Call, 306; and *Wyatt vs. Sadler's heirs*, 1 Munf. 537, were all decided upon that principle; though in the first, the concluding words of the will, "this is my will and the way I desire my estate to be disposed of," were also taken notice of by the court. In the last case, however, of *Wyatt vs. Sadler's heirs*, not only were there no words of limitation in the devise, but the introductory words were, "as to what worldly goods it hath pleased God to give me, I leave and bequeath as follows:" neither the word "estate" nor any equivalent word being used; yet the devisee under a general devise of land, without any words of limitation, was held to take a fee, thus giving, under the supposed intention of the testator, an effect to words in the preamble, which if used in a devise in a will, without a preamble, would not have such an effect. But however great our deference for the tribunals of that and the other sister states, we cannot agree to unite with them in such a departure, (as we think,) from a long settled rule, which has become the law of the state. The same rule has been recognized and acted upon by the courts of *Pennsylvania*. In *Busby vs. Busby*, 1 Dallas, 226, the prefatory words of the will were, "as to what worldly estate I am blessed with, I dispose of as follows:" The testator then, after a devise of lands in fee to his son, devised certain other lands, without any words of limitation, to his wife. He then gave to his wife, in lieu of her dower, one third of such of his personal property as should remain after the payment of debts, legacies, and funeral expenses, and bequeathed the remaining two thirds to his son and his five daughters. The question was, as to what estate the wife took in the premises devised to her, and the court decided, on the authority of *Frogmorton vs. Wright*, that she took only an estate for life. In *Lambert's Lessee vs. Paine*, 3 Crunch, 97, there were no introductory words showing the intention of the testator, but the devise was immediate of "all the estate called *Marrowbone* in the county of *Henry*, containing," &c. "likewise one other tract of land in said

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county called," &c. The question was, whether the devisee took an estate in fee or for life only, in the tract of land called *Marrowbone*, which depended upon the sense in which the word "estate" should be taken, whether descriptive only of the particular tract of land devised, or as denoting the quantum of the testator's interest in the land; which being entirely a question of construction upon words of dubious import in a devise, the whole will was examined by the court, for the purpose of ascertaining in what sense the word was used by the testator, that is, whether he used it as a word of description only, or to denote the quantum of his interest in the land; and the court being of opinion, that as there used, it was not descriptive only, of the particular tract of land devised, but denoted the quantum of the testator's interest, decided that the devisee took an estate in fee; and *Washington, J.* said, "that words which import nothing more than a specification of the thing devised, as all my lands, all my farms, and the like, have never been understood to pass more than an estate for life, even when aided by an introductory clause, declaring an intention to dispose of all his estate."

The case of *Lippett vs. Hopkins & others*, 1 *Gallison*, 454, did not turn at all upon the effect of the introductory words of the will, but *Lippett*, the devisee, was held to take a fee under his father's will, expressly upon the ground, that a devise to one generally, with a limitation over, only upon the contingency of his dying before he should attain the age of 21, gives an estate in fee to the first devisee, for which *Frogmorton vs. Holyday*, (*cum aliis*,) is referred to as authority; and the judge who decided the case, after stating the rule of law so often adverted to, said, "nor is it sufficient for the testator to express a general intention to dispose of all his property, to turn an estate, otherwise for life, to a more enlarged estate. For though general introductory words to this effect may sometimes aid in the construction of doubtful and obscure clauses, yet they are not permitted to supply material defects, or to convert a life estate into a fee."

We are not, however, without decisions by the courts of this state, and of this court, on which we think we may safely rest, and by which, we hold ourselves bound. In *Owings vs. Reynolds*, at December term, 1810, the will has these pre-

fatory words, "and as to *what* it has pleased God to bless me with, I dispose as follows," &c. and immediately following, the testator by a general devise, without limitation, &c. gave to his eldest son and heir at law *sixty acres of land*, part of a tract of land called *Taylor's Forrest*. He then devised the residue of that tract of land to his wife during her natural life, and after her death generally to his son *Lot Owings*, &c. and it was held, that *Lot* took only an estate for life. In that case, as in this, there was an introductory clause; in that case, as in this, there was a general devise without limitation to the heir at law; and in that case, as in this, there was an express estate for life given to the widow. Here there is a residuary clause, relating to personal property only, in that case there was no residuary clause, which furnishes as strong a presumption, that the testator supposed he had disposed of the whole of his estate, as can arise from a residuary clause of personalty only; and every argument in favour of a fee, that can be raised in this case, was equally applicable to that, with the additional circumstance, (among other things more strong,) that there, the devise to *Lot Owings* was a limitation over, after an estate for life; and the circumstance, that the word "estate," which is to be found in the preamble of this will, but was not used in the preamble to *Owings's* will, makes no manner of difference. In that case the expressions were, "as to *what* it has pleased God," &c. by which it is as clearly manifested, that the testator had the whole of his property in view, as if the word "estate" had been used, the word *what* having reference to every thing he had, and the will itself containing devises of real as well as bequests of personal property.

Walters vs. Walters, in this court, at June term 1811, was decided upon the same principle; the introductory words were "as for my worldly goods, which it hath pleased God to bless me with in this life, I give and dispose of in the following manner and form." After directing the payment of his debts and funeral charges, the testator made a general devise, without any limitation, of part of a tract of land, to one of his sons, and then made a similar devise of another part of the same land to his son *Benjamin Walters*. To the heir at law he devised certain lands for life, and all the other devises in the will were without words of limitation, &c. and it was ruled that *Benjamin Walters*

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took only an estate for life. The residuary clause was held to be applicable to the personalty only; and *Chase*, Ch. J. in delivering the opinion of the court said, that the testator, in the introductory clause, manifested an intention to dispose of the whole of his estate. Which he clearly did, if that kind of introductory clause manifests any thing; for the first thing disposed of in the will, was part of a tract of land, which shows, that the words "worldly goods" were intended to be applied, as well to real as to personal property. And in *Tofield vs. Tofield*, 11 East, 246, it was decided, that where a testator calls his real estate, personal property, it may pass by that description. From these cases, that under consideration cannot in principle be distinguished. We are therefore of opinion, that *Robert Beall* and *Joseph Beall*, took a life estate only in the premises in question under the will of their father *James Beall*; the devise to them being general without words of limitation, or any other words added, sufficient to carry a fee, but the expressions used, being such, as import in law an estate for life.

It may perhaps be safely assumed, that every man, when about to make his will, has the whole of his estate in view, and that the belief, often repeated by Lord *Mansfield* and other distinguished judges, "that in almost every case, where a general devise is restricted to an estate for life, the intention of the testator is defeated," is not without foundation, and yet they felt themselves bound by the rule of law. If the question here, was a mere question of intention, there would not be much difficulty in conjecturing what estate the testator meant to give; but the question is not what he intended to do, but what according to long settled principles of construction he did do. Perhaps it would be better if the rule were changed, and that in every case the fee should pass, unless restrained by words of limitation. But that can only regularly be effected by an act of legislation, with which we have nothing to do.

It is high time that the question involved in this case was set at rest, and this elaborate, and I fear tiresome examination of it, has been gone into, in order that it may now be finally settled.

JUDGMENT AFFIRMED.

GRAHAM, *et ux.* vs. YATES and MYERS's Heirs *et al.*

1824.

JUNE.

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Yates and Myers

APPEAL from the court of chancery. This bill was brought to compel *Thomas Yates*, and his trustees, to convey to the complainants a square of ground called *Hampstead Hill*, in the city of *Baltimore*, upon an alleged contract by *Charles Myers*, the father of *Matilda Grahame*, the female complainant, of whom she is the only child and heir. The bill asserts the payment of the money, and that in pursuance of the contract, *Charles Myers* took possession of the property in 1797, and improved and lived upon it until his death in 1806, and that it has been in possession of the complainants ever since. The answers denied the contract as to the whole square, but admitted it as to part, viz. a part called *Stephen Stuard's* part; and denied the payment of the purchase money, and possession in *Charles*, and the complainants, of the whole. The trustees of *Yates*, and the heirs of *Jacob Myers*, were willing to convey the admitted part, on receiving the purchase money and interest. The trustees of *Yates* claimed the residue of the square as part of *Yates's* estate. The heirs of *Jacob Myers* claimed it as part of *Jacob Myers's* estate. It would be impracticable to give a clear or specific view of the grounds of these pretences of title, by the respective defendants, without giving a voluminous detail of facts. The claim of the heirs of *Jacob Myers* involved the consideration, how far certain judgments and sales by *fieri facias*, and recovery in ejectment, and sales under a decree in chancery, were competent to divest the title of *Jacob Myers*.

KILTY, Chancellor, decreed a conveyance for *Stephen Stuard's* part only, and that on payment of the whole purchase money and interest. From which decree the complainants appealed to this court.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

Taney and *R. Johnson*, for the Appellants, contended, 1. That the judgments and sales by *fieri facias*, and recovery in ejectment, and sales under the decree in chancery, did divest the title of *Jacob Myers*. 2. That the proof supports the allegations in the bill of the purchase, the payment of the purchase money, the pursuant possession of the complainants, and *Charles Myers*, under whom they claim, and their title to have a decree for a conveyance.

The complainant's bill alleged a contract for the whole of a square of ground, payment of the purchase money, and possession under the contract. The defendant's answer denied the contract as to the whole square, but admitted it as to a part; and also denied payment of the purchase money, and possession of the whole square—Decreed, that on payment of the whole purchase money, and interest, the defendant should convey the part of the square.

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3. That the decree of the chancellor is erroneous, in requiring the payment of the whole purchase money, and limiting the conveyance only to part of the lot of ground.

Harper, Magruder and Speed, for the Appellees.

The opinion of the court was delivered by

BUCHANAN, Ch. J. It is the opinion of the court, that the leasehold interests arising out of the lease by *Bond to Tyson*, of the 6th of August 1780, are wholly extinguished; but we think, that on principles governing courts of chancery, the alleged contract between *Charles Myers* and *Thomas Yates*, which the complainants seek to have enforced, but which is denied by *Yates* in his answer, is not sustained to the extent claimed; we think too, that the payment of money, which is also denied in the answer of *Yates*, is not sufficiently proved.

The decree of the Chancellor is therefore affirmed without costs.

DECREE AFFIRMED.

JUNE,

KNOTT vs. DIGGES.

An action on the case will lie for a consequential injury sustained by the plaintiff, where both an immediate and consequential injury is alleged—as, where he proves that a servant of the defendant, with his express directions, rode his mare several miles through different farms, and turned her out, whereby he lost her services for many days: which the defendant attempted to justify, by offering to show that the mare was trespassing upon his close—It was held, that the defendant had the right to arrest the mischief to his close, by removing the trespassing animal to the exterior limits of it, but further than this he could not go.

APPEAL from *Charles* county court. This was an action on the case, and the declaration alleged that the plaintiff, (now appellant,) was possessed of a dark bay mare of the value of \$200, as of his proper goods, whereby he received profit and advantage; yet the defendant, (now appellee,) not ignorant of the premises, but maliciously intending and contriving to injure the plaintiff in this particular, then and there illegally and tortiously took possession of the said mare, and carried her to a great distance from the farm of the plaintiff, and there turned her loose, and injuriously and cruelly treated the said mare by riding her hard, thereby lessening her value, whereby the plaintiff lost the use and service of said mare for a long time, to wit, for the space of six months; and was otherwise thereby greatly injured and damaged to the value of \$500, &c. The defendant pleaded not guilty. At the trial, on the facts given in evidence, which are fully stated in the opinion delivered by this court, the county court, [*Stephen Ch. J. Key*, and *Plater*, A. J.] on the defendant's prayer, directed the jury, that if they should be of opinion that the mare was only rode as far as was sufficient to prevent her

Returning to trespass on the plaintiff, and that no damage was done to her, that the plaintiff was not entitled to recover. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

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The cause was argued before BUCHANAN, Ch. J. EARLE, and MARTIN, J. by

Stonestreet, for the Appellant, and by

Stone, for the Appellee.

The opinion of the court was delivered by

EARLE, J. Both an immediate and consequential injury is here alleged, although it has been the pleasure of the plaintiff to sue in case, for the consequential injury only. To sustain his cause, he offered to prove, that a servant of the defendant, with his express directions, rode his mare several miles through different farms, and turned her out, whereby he lost her services for many days. This trespass the defendant attempted to justify in evidence, by offering to show, that the plaintiff's mare was trespassing upon his close, and that he caused her to be thus rode, to prevent a repetition of the trespass; and this forms the subject to be decided on by this court. Trivial as it is, we consider it, on the evidence in the record, a trespass unjustified, and are constrained to send it back for further trial. The defendant had the right to arrest the mischief to his close, by removing the trespassing animal to the exterior limits of it, but further than this he could not go. Riding the mare some miles beyond those limits and turning her out, was an unlawful disturbance of the possession of the plaintiff's property, for the consequences of which the defendant is responsible.

JUDGMENT REVERSED, &c.

CRAUFURD vs. THE STATE use Muir.

JUNE.

APPEAL from Prince George's county court. This was an action of debt brought on a bond entered into to the

defendant, signed, sealed and delivered by him, are facts to be submitted to the jury.

Whether an instrument of writing is required by law to be recorded, the enrolment of it is evidence of all circumstances necessary to give it validity. But this evidence is not conclusive. It is only *prima facie*, and like all *prima facie* evidence may be rebutted.

A, as the administrator of F, executed in due form of law, an administration bond in 1812, which was approved by the orphans court, and on which he obtained letters of administration. He afterwards, in 1816, executed a similar bond, which was placed upon the records of the orphans court, and upon which an action was brought against one of the sureties therein, who pleaded *non est factum*, and that the bond was delivered as an *escrow*, and it was proved that the obligors signed and sealed the bond. Held, that parol evidence was admissible to prove how the bond of 1816 came into the office of the register of wills, and why it was recorded; but that no such evidence was admissible respecting the bond of 1812.

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state, on the 9th of November 1816, by *John M. Hepburn*, with *Thomas R. Hodges* and the appellant, (the defendant in the court below,) conditioned that *Hepburn* should well and truly perform the office of administrator of *Jane Fishwick*, &c. The defendant pleaded, 1. That the bond was delivered as an *escrow*. 2. *Non est factum*. Issues were joined, and the plaintiff assigned for breaches, that on the 8th of April 1819, there remained in the hands of *Hepburn*, of the clear estate of *Fishwick*, the sum of \$6571 92, by the account of the said *Hepburn* passed by the orphans court; and that *Robert Muir*, at whose instance this suit was brought, is the administrator of *James Muir*, deceased, one of the representatives of the said *Fishwick*, and as such entitled to the one fourth part of the said clear estate, amounting to \$1642 98; and that *Hepburn*, although requested, never did pay, &c.

At the trial, the counsel of the plaintiff produced the bond on which the action was brought, dated the 9th of November 1816, and proved by the subscribing witness thereto, that the defendant, and the other obligors therein named, signed and sealed, and that he, as the subscribing witness, attested the same. The counsel of the plaintiff also produced an attested copy of said bond, certified by the register of wills of *Prince George's* county, as taken from the original bond filed and recorded in his office. The defendant then proved by said register of wills of *Prince-George's* county, and who was register before and has been ever since the year 1812, that the second bond on file in his office, purporting to be an administration bond on the estate of *Jane Fishwick*, and bearing date the 9th of November 1816, was delivered to him by *John M. Hepburn*, the administrator on said estate, during the recess of the orphans court, and without any application having been made either to the court or register, by any person interested in said estate, for additional or counter security, and was consequently never called for or acted upon, or sanctioned by the court; and at the time *Hepburn* delivered to the register the second bond, the register had some conversation with him, but which he could not now recollect. That this bond, being found in the office, was recorded by a deputy in the office, without any orders from the register or the court. That he did not recollect that he had any instruction from *Hepburn* at the time the bond was delivered to him to record

it as an administration bond. That on the 6th of May 1812, *Hepburn* filed a bond, which the register produced, dated the 6th of May 1812, executed to the state by said *Hepburn*, with *Jane Hepburn* and *John S. Brookes* his sureties, conditioned for the performance, by said *Hepburn*, of the office of administrator of said *Fishwick*, and on the same day obtained letters of administration on the estate of said *Fishwick*, which bond was afterwards approved by the orphans court, and still remained on record in the orphans court as the administration bond of the said *Fishwick*. The counsel for the plaintiff objected to this proof as inadmissible, and the court, [*Stephen*, Ch. J. and *Key*, A. J.] being divided in opinion, the testimony was rejected. The defendant excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before *BUCHANAN*, Ch. J. *EARLE*, *MARTIN*, and *ARCHER*, J.

Taney, for the Appellant, contended, that an attested copy, by the register of wills, of a bond purporting to be an administration bond, is not conclusive evidence that the bond was signed, sealed or delivered; and that therefore parol evidence was admissible to prove it was delivered as an escrow, or not delivered at all. Under the act of 1798, ch. 101, sub ch. 3, an administration bond must be approved by the court before it is admitted to record. A copy of the bond from the record was not conclusive evidence that the bond was given and accepted under any order of the court. Suppose the case of a forged administration bond, and suit was brought on an attested copy, it could not be contended that the person whose name was forged would be estopped from pleading *non est factum*. He would not be concluded by the copy, which might be *prima facie* evidence, but not conclusive evidence of the execution of the bond.

Magruder, for the Appellee. The law requires that the suit should be brought on an attested copy of the bond. There was no general prayer to the court below, whether the evidence was sufficient to entitle the plaintiff to recover. The object of the proof of the register was to falsify his record. Parol evidence is not admissible to contradict a record. The register of wills was not a competent witness to prove the facts set forth in the bill of exceptions.

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Sewell vs. Hepburn, in this court, at June term 1818, is relied on against the admission of parol evidence in the present case. He also referred to 1 *Phill. Evid.* 237, 238; and *Leighton vs. Leighton*, 1 *Str.* 210.

MARTIN, J. delivered the opinion of the court. Whether the paper dated the 9th of November 1816, on which this suit was instituted, is the deed of *Craufurd*, signed, sealed, and delivered by him, are facts to be submitted to the jury; and the only question for the consideration of this court is, whether the testimony offered at the trial ought to have been received for that purpose.

The counsel of the plaintiff, to support the issues on the part of the plaintiff, read in evidence to the jury the *original* bond of 1816, having proved by the subscribing witness, that it was signed and sealed in his presence, but nothing said of the delivery. Had he rested his case *entirely* on this *original* paper, it cannot be doubted that it would be competent for the defendant, upon the pleas in this case, to give evidence that the bond was delivered as an escrow; and if the jury were satisfied that the defendant had proved his pleas, they ought to have rendered a verdict in his favour. But the plaintiff also offered in evidence a certified copy of this bond from the records of the orphans court, and this presents the question, whether that copy was conclusive evidence of the due and legal execution and delivery of the bond.

Where an instrument of writing is required by law to be recorded, the enrolment of it is evidence of all circumstances necessary to give it validity. But this evidence is not conclusive; it is only *prima facie*, and like all *prima facie* evidence may be rebutted. To give it a conclusive effect might be ruinous to the community; an enrolment, however obtained, would exclude all inquiry; it would be a shield and protection to fraud, forgery and deceit.

We therefore think that the court erred in rejecting that part of *Trueman Tyler's* testimony that related to the bond of 1816; the residue of his testimony, respecting the bond of 1812, was not legal evidence, and the court did right in excluding it.

The judgment is reversed with costs, and a *procedendo* awarded.

MARTIN vs. THE MECHANICS BANK OF BALTIMORE.

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APPEAL from *Baltimore* county court. *Assumpsit* by the holders of an inland bill of exchange against the payee. *Plea, non assumpsit*. At the trial, the plaintiffs, (now appellees,) gave in evidence an accepted bill of exchange, drawn on the 24th of August 1819, by *W. P. Strike*, on *W. and A. H. Woods*, for \$645, and payable to the defendant, (the appellant,) or order, nine months after date, and delivered to the defendant, who endorsed it to *J. Hudson*, who endorsed to *W. M. Mechen*, who endorsed to the plaintiffs. The hand writing of all the parties to the bill was admitted; and it was also admitted that a regular and legal demand was made upon the acceptors on the day on which the bill became due, that they refused to pay it, and that due and legal notice of such refusal on the part of the acceptors, was on the same day given to the drawer, and each and every of the endorsors, and that the draft was also, on the same day, regularly protested for nonpayment. The defendant then gave in evidence, that *W. & A. H. Woods*, the acceptors of the bill, did, on the day on which the same was due, to wit, on the 27th of May 1820, and for a long time before, and until the 30th of December thereafter, keep an account with the plaintiffs, at their banking house in the city of *Baltimore*, by depositing, and from time to time checking out, money, and that on the day the bill became due, *W. & A. H. Woods* had no money in bank; but that on the 20th of June 1820, a balance was struck between said bank and said *W. & A. H. Woods*, and they then had in bank the sum of \$700; that the plaintiffs are a banking institution at the city of *Baltimore*; that said bill was discounted by them before it became due, and was held by them from that time to the time of trial. On this evidence the defendant prayed the court to direct the jury, that the plaintiffs were not entitled to recover. Which the court, [*Hanson and Ward, A. J.*] refused to do. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

In an action on an inland bill of exchange, by an incorporated bank, as the holder of the bill which they had discounted before it became due, against the payee, evidence was given that the acceptors of the bill, on the day it became due, and for a long time before, and for several months thereafter, kept an account at the said bank, by depositing, and from time to time checking out money, and that on the day the bill became due they had no money in bank, but that about a month afterwards a balance was struck between the bank and the acceptors, when they had a sum of money sufficient to have discharged the bill—*Held*, that the bank was entitled to recover the amount of the bill from the payee. That the conduct of the holders of the bill with regard to the acceptors, was not a waiver of their right against the endorsors, nor a release as to them. And as between the holders and the acceptors there was no payment

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

Frick, for the Appellant, raised the following points: 1. That the conduct of the appellees, as holders of the bill

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in question, with regard to the acceptors thereof, was in law a waiver of their right against the endorsors, one of whom was the appellant—i. e. as to the endorsors it was a release. 2. That as between the holders and acceptors there was a payment in full. He contended, 1. That this was an attempt to revive a debt which had been extinguished. That the special facts set forth in the bill of exceptions operate to discharge the legal liability of the endorsors on the bill. That the bank having at one time had money enough in their hands to satisfy the same, were clearly entitled to apply it to the credit of the bill, and their *laches* in this particular is not to operate against the endorser. No doctrine is clearer than that, in the absence of a specific appropriation, the receiver of money has the right of applying it. *Campbell vs. Hodgson*, 1 *Niel Gow*, 74, and the cases there cited. *Gwinn vs. Whitaker*, 1 *Harr. & Johns*, 754. Here the receivers neglected to apply it at all, and returned it to the acceptors of the bill, to the prejudice of the sureties on the bill, to the credit of which bill they were bound to apply it; because the act in itself amounts to an indulgence—a giving a *new credit* to the acceptors, without the concurrence of the other parties entitled to sue upon the bill. It is in effect giving time to the acceptors, to the injury of the other parties on the bill. And, shall the endorser be said not to be injured where the holder has in his possession the funds of the acceptor, *the very means of satisfaction and payment*, yet waives the application of them to the bill? If this be not in effect a release, (as far as the endorsors are concerned,) it is at least an extension of credit, a giving time, that operates the same effect, and comes within a class of cases almost too numerous for reference. The general abstract of them is in *Chitty on Bills*, 371, 372, 375. The leading cases are *English vs. Darley*, 2 *Bos. & Pull*. 61. *Gould vs. Robson*, 8 *East*, 576. *Tindall vs. Brown*, 1 *T. R.* 167. *Clarke vs. Devlin*, 3 *Bos. & Pull*. 363. It will be seen that all these cases turn upon the injury which the endorser sustains by the conduct of the holder with regard to the acceptor; and in this view the present case is stronger than any in the books. The holders were in fact paid the amount of the bill over and over, and often, yet suffered it to pass, and now, that the acceptors are insolvent, resort to the endorsors. That due notice was given, protest, &c. does not

alter the case. *Chitty on Bills*, 371, 372, 373. Look moreover at the state of the parties—The bill was due and protested on the 29th of May 1820; the acceptors continue their accounts and dealings with the holders until the 30th of December 1820; the endorsors are fairly to assume that the bill is included in the mutual debits and credits, and are left uninformed until the 6th of March 1821, when this suit is instituted, and the endorsors, for the first time after the protest, are informed that the bill is yet in existence.

2. If this view be not correct, if there was no giving time, it is contended that there was a payment, and this upon positive authorities. *Chitty on Bills*, 370. *Clayton's case*, 1 *Merivale*, 572. *Marsh vs. Houldith*, *Chitty on Bills*, 370. 2 *Bridg. Index*, 586, 587. *Sleeck's case*, 1 *Merivale*, 568. *Carr vs. Carr*, *Ibid.* 341, (note.) The principle is distinctly asserted by these authorities, that money paid into a banker's hands constitutes a debt, not a deposit. He becomes a debtor for the amount. That in account with bankers all entries go to reduce the earliest part of the account. *Clayton's case* was, that an unsecured banking account, continued after the death of one of the bankers by his surviving partners, who as such were liable to pay all debts incurred in the life-time of their deceased partner; and it was determined that the first monies paid in must be applied to any balance that at any time remained unsatisfied. In support of this principle the court are referred to *Hammersley vs. Knowlles*, 2 *Exp. Rep.* 666. *Dave vs. Holdsworth*, *Peake's N. P. Cas.* 64. *Peters vs. Anderson*, 5 *Taunt.* 201. *Bodenham vs. Purchas*, 2 *Barnw. & Ald.* 39, 45, 46, 48. *Brooke vs. Endorby*, 2 *Brod. & Bing.* 70, and *Marsh vs. Houldith*, *Chitty on Bills*, 370.

R. B. Magruder and Stricker, for the Appellees. This is a question not merely between the parties in the record. It is an attempt to introduce a *new* principle, or to amplify an *old* one, and extend it beyond proper limits. The judges in *England* have uniformly resisted such attempts, and have adhered to *fixed* principles, even though inconvenient in their operation, and unwholesome. This may be illustrated by a reference to *Bickerdike vs. Bollman*, 1 *T. R.* 405. The rule established in that case has been re-

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peatedly regretted, yet as repeatedly adhered to. *Watlyn vs. St. Quintin*, 1 Bos. & Pull. 652. 2 Esp. Rep. 516, S. C. *Staples vs. Okines*, 1 Esp. Rep. 332. *Orr vs. Maginnis*, 7 East, 362, *Legge vs. Thorpe*, 12 East, 175. *Exparte Wilson*, 11 Ves. 411. *Heath Exparte*, 2 Ves. & Beames, 240. So determined have been the judges to resist its further relaxation, that of late years it has been confined to its *letter*, and the *reason* upon which it was founded has been disregarded. *Staples vs. Okines*. *Orr vs. Maginnis*. *Hammond vs. Dufrane*, 3 Camp. 145. *Thackray vs. Bennett*, *Ibid*, 164. *Chitty on Bills*, 267. These cases show the necessity of resisting the *introduction of new principles*, and especially in relation to the *great circulating medium* of the commercial world, as *bills of exchange* and *promissory notes* may be emphatically called. The facts from the record present two questions, 1. Has the bank by its conduct or dealings with the acceptors, (Messrs. *Woods*.) waived its right of resort against the endorsors, or in other words, released the appellant, who is one of them? 2. Supposing the bank has not so released the appellants, as between the bank and the acceptors, was there "*a payment in full*?" In other words, do the circumstances set forth in the bill of exceptions constitute a payment in *fact*, or are they in *legal contemplation* a payment, producing by *operation of law* an extinguishment or annihilation of the debt due upon the bill, and of course a release of the endorsors.

1. As to the *first question*. What were the dealings complained of? The liability at the maturity of the note is admitted. What subsequent dealings or conduct of the bank have discharged that liability? If the dealings complained of have released the appellant, it must be upon the grounds of some prejudice to the rights of *subrogation*, viz. either 1st. An agreement not to sue. 2d. An agreement to extend the time, (*novatio debiti*;) or 3. A composition of part for the whole, &c. As to what a holder *may do*, and what he *may not do*, see *Chitty on Bills*, 371, and the cases referred to; also *Bordley vs. Buchanan*, 4 Harr. & M. Hen. 43. Is the case at bar within the principle of those cases? But it has been alleged that the bank received \$700 from the acceptors, and might have paid themselves, and they ought in common justice to have done so—to have stopt this money for the benefit of the endorsors. No such

contract was made by the bank. *Non hæc in fœdera veni.* They made no such contract *in law*. Did they in equity? A creditor is not bound to use active diligence, *Wright vs. Simpson*, 6 Ves. 734. The utmost that a surety can do, is to apply to chancery, and *on terms*, get relief, by obliging a creditor not to exercise his *legal* privilege of not suing the principal, and *even then, he may sue the surety*. And for whom was the bank to exercise this *active diligence*—this *superabundance of sedulous solicitude*—this *extreme vigilance*—to watch and foster and protect—to violate its faith by stopping a sacred deposit—to stop perhaps the money of other people, and thereby risk a law suit? Was it for a surety who notified them of this balance? Or even *privately* offered an indemnity, much less through a court of chancery? Or was it for a debtor, who after violating his contract, and refusing to pay money lent upon the faith of *his* name, and damnifying his creditor, *craves* and defies him, and endeavours to shelter himself under legal shift, and technical subterfuge? It is impossible that such a defence can be sanctioned.

2. The *second question*. As between the bank and the acceptors, was there “*a payment in full?*” It will not be contended that there was any payment *in fact*. That this money so put in, deposited, or “*paid in,*” (if that expression is better liked,) was placed there *animo solvendi*, because the verdict negatives such an inference, and it is repudiated by all the circumstances. Payment is a matter *in pais*, and goes to the *gist* of the action. All the circumstances contradict the *fact* and *intention* of *paying*. Sometimes “*the circumstances*” amount *in law* to payment, and when proved support a plea of payment; thus *solvit ad diem* may be supported by the proof of certain facts; but this legal inference may be rebutted by other slight circumstances. So in the case at bar, it is contended that the circumstances stated in the bill of exceptions, amount *in law* to a payment, and by extinguishing and annihilating the debt on this bill, work a release of the endorsors. To maintain this position, the appellant must establish, 1st. A *right* in the bank to apply this money against the will of its debtor. 2d. An *imperative obligation* to do so for the benefit of the sureties. 3d. That as between *Woods* and the bank, *the law* attributed this money to the payment of this bill. 1st. The bank’s right may be doubted. If

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the right exist, it must be from assimilating a bank to a private banker in *England*. There are reasons why the bank might *not* possess it, even if a banker did, viz. Liens and other rights of bankers depend upon usage, and this usage differs in city and country, and between different cities. A customer is more *cautious* in depositing with a *private* banker, than with a bank. But admitting there is no difference between a bank and a banker, if a bank has the right, it must be from that of *lien* or set off. As to *lien*.—In *Davis vs. Bowsher*, 5 *T. R.* 488, Lord *Kenyon* says, “a banker has a lien upon every thing in his hands for his general balance, unless there be evidence to show that he received any particular security under special circumstances which would take it out of the common rule.” And in *Giles vs. Perkins*, 9 *East*, 12, Lord *Ellenborough* says, that “a banker has no lien upon any thing in his hands unless his cash account be overdrawn.” Let the principle of these cases be applied to the case at bar; and let the question be asked, whether, if the *Woods* had failed on the 20th of June, their assignees could not have recovered the \$700 for the general benefit of all the creditors? It is clear then from these cases, and the question last put, that the bank had no *lien*. As to *set off*.—It has been argued that the bank had the same right as an individual had to set off the \$700. If an *individual* has the right, it does not follow that a bank has. The general idea is, that a *deposit* is sacred. Is it certain that either a bank or an *individual* has the right under such circumstances? A creditor having money remitted to him clogged with a condition, has no lien, and cannot retain for his own debt. *Williams vs. Everett*, 14 *East*, 587, 590. Bills put with a banker for a specific purpose, cannot be appropriated otherwise. *Parke vs. Eliason*, 1 *East*, 550. A creditor is bound to apply the money left with him, to the particular purpose it was left for, “unless he directly repudiated it.” *De Barnales vs. Fuller*, 14 *East*, 590. After the acceptance of the deposit of \$700, and the striking and acknowledgment of a balance, the circumstances amounted to a direction by the debtor, and an assent by the bank, to hold it subject to *Woods’* check, and that unless the bank so meant to hold, it was bound forthwith to repudiate. Hence the right of set off is not absolutely certain. 2d. Admitting the right both of lien and set off. The right is one thing—im-

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perative obligation is another. A *lien* is cumulative, and a *set off* a statutory privilege, not a common law right. The exercise of such right ought to be discretionary. For example, the risk of gaming, usury, negro buying, &c. or reasons satisfactory to the bank why it should not *set off*, as that the money belonged to *other* people, charitable institution, &c. The consequences of an imperative obligation to exercise this right, would be that the bank must look every day into the account of every man whose name is on a note. They must examine their transfer book—They must search the records for their mortgages, &c. It comes back to the question—*Did the bank make any such contract?* It must be answered that it did not. 3. Because this was a *bank's* account, did the *law* imperatively attribute the \$700 to the payment of this bill, and thereby annihilate or extinguish the debt due thereon, and so release the endorsors? *Clayton's* case, 1 *Merivale*, 610, supported by *Brooke vs. Enderby*, 2 *Bro. & Bing.* 70, and *Bodenham vs. Purchas*, 2 *Barnw. & Ald.* 45, has been relied upon by the appellants. Before the case at bar is distinguished from *Clayton's* case, let us look at the different rules for the attributing, applying or appropriating payments. 1st Rule. That a *debtor* may peremptorily appropriate his payments, and if he neglect to do so, and his intention be not shown by circumstances, the *creditor* may apply. *Newmarch vs. Clay*, 14 *East*, 239. *Peters vs. Anderson*, 5 *Taunt.* 201. *Plomer vs. Long*, 1 *Stark.* 153. *Bodenham vs. Purchas*, 2 *Barnw. & Ald.* 45. *Gwinn vs. Whitaker*, 1 *Harr. & Johns.* 755. 2d Rule. That a debtor to a banker even has a right *peremptorily* to direct the appropriation of his money; and though indebted to the banker, may direct him to pay the money to a *stranger*. *De Barnales vs. Fuller*, 14 *East*, 590, (note.) *Kilsby vs. Williams*, 5 *Barnw. & Ald.* 815. And creditor, (a banker,) having money remitted to him, *clogged with a condition*, cannot apply it to pay his own debt. *Williams vs. Everett*, 14 *East*, 587, 590. And creditor having bills deposited with him for a specific purpose, cannot appropriate them otherwise. *Parker vs. Eliason*, 1 *East*, 550. 3d Rule. That in *all* cases, debtor and creditor may *agree* as to the appropriation of money, and may determine its character. This is admitted in *Clayton's* case, 1 *Mer.* 599, 610, and in *Bodenham vs. Purchas*. May be a *deposit* and not a *payment*, if the

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parties so agree. *Hammersley vs. Knowlys*, 2 *Esp. Rep.* 667. *De Barnales vs. Fuller*, 14 *East*, 590, establishes it a *deposit*, because the bank did not “repudiate it as such directly.” 4th *Rule*. Appropriation may be inferred “from circumstances,” in all cases, even bankers. *Hammersley vs. Knowlys*. *Marsh vs. Houldith, Chitty*, 370. *Newmarch vs. Clay*. *Peters vs. Anderson*. *Bodenham vs. Purchas*. *Kilsby vs. Williams*, and *Clayton’s* case. But in the absence of appropriation by debtor, or by agreement, or by circumstances showing the appropriation, the rule in *Clayton’s* case applies. Now the case at bar falls within none of these rules, because the \$700 were not put into bank *animo solvendi*—it was no *payment*. But admitting it was.

1st. The manner of keeping the cash account showed an express agreement, amounting to a direction by the debtor that this \$700 should be attributed to *Woods’* cash drafts, or checks, and that his cash dealings should be kept distinct from his other. No agreement could be more express than the *bank book*, which was in writing, and the bill of exceptions states that it was an account kept “by depositing, and from time to time checking out money.”

2d. The “circumstances” showed such an appropriation by the debtor, or such a concurrence between debtor and creditor as is before stated, if the bank book, and fact stated in the bill of exceptions, do not show an *express* appropriation. The course of dealings—the mode of keeping the cash account—the refusal to pay the bill—suffering a protest and leaving the bill in the hands of the bank till the trial—the bank furnishing, and *Woods’* accepting after the 27th of May, an account in which the bank is their debtor \$700, *without objecting*—their refusing to check to take up the bill—the bank leaving the bill out of their account, and not insisting to apply this money to it, prove the intention of the parties.

3d. There being distinct and separate accounts and dealings between the bank and *Woods*, viz. the debt upon this bill, and the *cash* account, and perhaps other notes and bills, there was not “an entire, unbroken account of all the transactions kept between the parties.” The inference is 1st. The case is of course distinguishable from *Clayton’s* case. 2d. It falls within the *first rule* laid down, that if debtor neglect, &c. creditor may attribute, and the bank did attribute it to the cash account between the 20th of June and 30th December. It is believed that it has

been shown, 1st. That the bank did no act to release the sureties within the principle of *English vs. Warley*, or *Bordly vs. Buchanan*. 2d. That the bank had no lien, no right of set off, even if an individual would have had. 3d. That if it had both, there was no *imperative* obligation to exercise the right. 4th. That the *law* did not, under any of the rules for attributing payments, oblige the bank, *at its peril*, to apply the \$700 to the payment of the bill.

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Glenn, in reply. 1. This case shows more than supineness—it shows a treating with the principal debtor, so as to affect the surety, as in the case of *Gould vs. Robson*, 8 East, 576. While this money was in the hands of the bank it could not sue, as a set off extinguished the debt, and the subsequent dealing with acceptors is at the peril of the holders. The bank has an election, but it is at its peril, otherwise a protested note or bill is a continuing guarantee for any subsequent advances. 2. A party paying has a right to appropriate if he do so at the time of payment. *De Barnales vs. Fuller*, 14 East, 590, (note.) If he omit to do so, the creditor has a right exercisable at any time, unless acts or circumstances show an intention of the debtor to appropriate. *Clayton's case*, 1 Merivale, 585. This as between the parties; but as relates to sureties, if both debtor and creditor omit to appropriate, the law makes it. *Gwinn vs. Whitaker*, 1 Harr. & Johns. 755. *Wallace vs. Johnson*, 3 Harr. & M'Hen. 590. Payments are always made in discharge of a subsisting debt. *Hammersley vs. Knowlys*, 2 Esp. Rep. 666. In the case of mutual debts, the balance only is due. *Edmeads vs. Newman*, 1 Barnw. & Cressw. 418. As between bankers, where a balance is due in favour of acceptor or original debtor, the note is paid. *Marsh vs. Houldith*, *Chitty on Bills*, 370, and *Hammersley vs. Knowlys*, 2 Esp. Rep. 666.

BUCHANAN, Ch. J. delivered the opinion of the court. Two points were presented to the consideration of the court in the discussion of this case—*First*, That the transactions set out in the bill of exceptions, between the appellees and W. and A. H. Woods, amounted in law to a waiver of their right of action, or to an exoneration of the appellant from all liability on account of his endorsement; and *second*, that by operation of law they amounted to a payment in full of the bill; which, beginning with the last,

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will be briefly examined. It is regretted that the account current between *W.* and *A. H. Woods*, and the appellees, does not appear in the record, by which the character of their dealings might be more distinctly developed, than by the statement in the bill of exceptions, which is, "that on the 27th of May 1820, the day on which the bill fell due, and for a long time before, and until the 30th of December following, the Messrs. *Woods* kept an account with the appellees at their banking house, by depositing, and from time to time checking out money; that on the day the bill became due, they had no money in bank, but that on the 20th of June following the account was balanced, when it appeared that the Messrs. *Woods* had in bank the sum of \$700. That the bill was discounted before it became due, and has ever since been held by the appellees." Now if the amount of the bill in question formed an item of debt against the Messrs. *Woods* in that account, making one continued and entire account of all their dealings, and was so treated by the parties, the principle of *Clayton's case*, 1 *Merivale*, 572, and of *Bodenham and Philips vs. Purchas*, 2 *Barnw. & Ald.* 39, would apply; and the balance struck, being the balance of one entire account, embracing all the transactions between the parties, the amount of the bill constituting a part of the aggregate amount on the debtor side of the account, it would follow, (the credits exceeding the debits,) that the amount of the bill was sunk, and the bill in contemplation of law discharged, and could not be revived as against the endorsors. But if it was in fact, an item of charge in the account, it was incumbent on the appellant to show it; and not having done so, we must take what appears in the bill of exceptions as our guide; and looking to that only, it would seem very clear, that the amount of the bill was not carried into the account, but that it was a cash account, consisting entirely of monies lodged in and checked out of bank, unconnected with any other transaction. In which, according to the usual course of such transactions, the bank must have stood charged with the sums placed in, and credited by the amounts checked out. The statement is, that the Messrs. *Woods* kept an account with the appellees, "by depositing, and from time to time, checking out money," confining it in terms to an account of deposits and checks, and excluding the idea of any thing else

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forming an item in the account. The case of *Hammersley vs. Knowlys*, 2 *Esp. Rep.* 666, much relied on in argument, was this—The defendant lent his note to one *Jefferys* for his accommodation, who, upon the faith of that note, and others, which he lodged with the plaintiffs as his bankers, borrowed of them the amount. *Jefferys* afterwards made a considerable payment into the house, and promised to pay the *balance*, but in no otherwise made any particular appropriation at the time of the sum paid. The amount of the notes on which the money was lent, constituted the then only subsisting debt. *Jefferys* afterwards became insolvent, and the suit was brought on the note lent to him by the defendant, in order to cover the general balance which had become due from him to the plaintiffs. But it was held, that as the only subsisting debt, at the time the payment was made by *Jefferys* on account, arose on the notes deposited with the plaintiffs, the amount paid could not be considered as a mere deposit, but should be applied to that account, and the plaintiffs were only permitted to recover the balance due on the notes, after deducting the amount paid; which is not like this case; there money was advanced to *Jefferys* on the faith of certain notes deposited as a security, the amount of which was charged to him in account, and constituted the only debit; and from his saying, when he made a payment into the house, *that he would pay the balance* when he received certain money which he expected, it is obvious that he intended it as a payment in part of the debt he then owed the plaintiffs, as by *balance* he could only have meant, the amount remaining due after deducting the sum paid; and as the only debt he then owed them arose on the notes deposited, he must have intended it as a payment on that account, and in part discharge of those notes. But here no money was loaned or advanced by the appellees on the accepted bill to the Messrs. *Woods*, nor is there the remotest ground for supposing, that any of the different sums of money, occasionally lodged by them in Bank, were either paid or received on that account. On the contrary, it is manifest that they were not. The principle that where a man indebted on several accounts, makes a partial payment, without applying it particularly to either, the creditor may make the appropriation, does not affect this case. The nature of a transaction may be such, as to show how a pay-

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ment was applied, without any express appropriation at the time by the party making it; and the circumstance that the bill in question was neither taken up by the Messrs. *Woods*, nor cancelled, which should have been done by the proper officer of the bank, if the monies placed there by them were either paid or received on that account, shows that it was not so intended or understood by either party. But the proof is, that for a long time before and after the bill became due, the Messrs. *Woods* kept an account with the plaintiffs at their banking house, by depositing, and from time to time checking out money, and that on a balance being struck upon that account, on the 20th of June, (some time after the bill was due,) the Messrs. *Woods* then had in bank the sum of \$700; but that on the day the bill became due they had no money in bank. Not that the account had then been closed, and a new account afterwards opened, on which the balance of \$700 appeared on the 20th of June, but that on examination the sums deposited were found not to exceed in amount, on the day the bill became due, the checks that had been issued, though no settlement appears to have been made, nor any balance struck; but it remained an open running account, consisting entirely of monies lodged in and checked out of bank, on which the sums placed in bank, after the bill was due, produced the balance that was afterwards struck on the 20th of June, the amount of the bill not constituting an item in that account, nor entering at all into the contemplation of the parties. And being a continuing unsettled account, all the monies lodged in bank, after the bill became due, must be understood, (nothing appearing to the contrary,) as having been so placed there, on the same terms, and with the same understanding between the parties, that accompanied the antecedent transactions composing that account; and it as clearly appears how they were applied, as if there had been an express appropriation of them at the time; that is, they were applied to the account of deposits and checks, in the language of the bill of exceptions, and the application being thus made by the parties themselves, the law will not make a different appropriation, which could not be done without violating the manifest understanding and intention of the parties. It is not the case of a general payment, of which no application was made at the time by either party, but a particular application by the respective

parties, for their mutual benefit and convenience, according to the common course of business in our monied institutions, of funds placed in bank for that especial purpose, which they had a right to make; and the transactions between them, in relation to the monies so placed in bank, did not by operation of law, amount to a payment and discharge of the bill, under the circumstances marking the character of the case.

The other position, "that the transactions between the appellees and *W. and A. H. Woods*, amounted in law to a waiver of their right of action, or to an exoneration of the appellant from all liability on account of his endorsement," is equally unsustained.

The holder of a bill may forbear to sue the acceptor as long as he pleases, and will not thereby discharge the other parties from their liability, provided he does not agree to give time to the acceptor, without their concurrence.

And if there was no obligation of active diligence on the plaintiffs, as holders of the bill, to sue *W. and A. H. Woods*, the acceptors, for the benefit of the endorsors, they were under no obligation to violate the terms on which the money was obviously placed in bank, and apply it to the payment of the bill for the benefit of the endorsors. It would have been an abuse of the confidence reposed in them by *W. and A. H. Woods*, for whom the bill was not discounted, and there was no greater obligation of active diligence in one case than the other.

The mere placing money in bank on deposit by the Messrs. *Woods*, had not of itself the effect to discharge the appellant from his liability as endorsor of the bill; and the not diverting, by the plaintiffs, the money from the purpose for which it was so placed, and received by them in bank, and applying it to the payment of the bill, was not more to the prejudice of the endorsors, than their forbearing to sue the acceptors, and did not amount in law to a waiver of their right of action against either of the parties.

JUDGMENT AFFIRMED.

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JUNE.

Stanfield
vs
Boyer

Words tending
to charge an un-
married woman
with fornication,
are not actionable.
A variance be-
tween the words
charged in the de-
claration, and the
words proved, is
fatal

STANFIELD vs. BOYER.

APPEAL from *Baltimore* county court. This was an action of *slander*. It is deemed unnecessary to state the slanderous words stated in the declaration. They charged the plaintiff, (who was an unmarried woman,) with fornication. The words proved were only such from which the fornication might have been inferred. On the defendant's prayer, the court, [*Hanson, A. J.*] refused to direct the jury, that the plaintiff was not entitled to recover. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

Glenn, for the Appellant, contended, 1. That the words charged in the declaration were not actionable, because they neither imputed a crime to the plaintiff, nor charged her with any thing which tended to exclude her from society, nor affected her in her trade or office. In other words, that to call an unmarried woman a whore, was not actionable. 2. That the words proved differ from those alleged in the declaration. On the *first point* he cited *Brooke vs. Coffin*, 5 *Johns. Rep.* 188, and the cases there cited. *Thesell vs. Cooper*, 1 *Roll. Ab.* 36. *Comb.* 138. The act of 1715, ch. 27, s. 3. 12 *Mod.* 248. On the *second point* he cited *Cook vs. Cox*, 3 *Maule & Selw.* 110; and *Hancock vs. Winter*, 7 *Taunt.* 205.

No counsel appeared for the Appellee.

The opinion of the court was delivered by

MARTIN, J. Two objections have been made to the judgment of the court below in this case, both of which, we think, are sustained upon established principles of law. The words, as proved by the witnesses, are not in themselves actionable, and if they were actionable, the variance between them and those laid in the declaration, is fatal.

We do not think it necessary to enter into a minute explanation of this case. The judgment of *Baltimore* county court is reversed, with costs to the appellant.

JUDGMENT REVERSED.

BATTURS vs. SELLERS & PATTERSON.

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Batturs
vs.
Sellers &c.

APPEAL from *Baltimore* county court. This cause was before this court at June term 1820, the judgment of the county court was reversed, and the case sent back with *procelendo*. See 5 *Harr. & Johns*. 117. It came again before the court, at the instance of the plaintiff below, upon a different question; and the facts in the case are fully stated in the opinion given by this court.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

Williams and *Meredith*, for the Appellant, stated, that the court below erred in admitting parol or verbal testimony to add to, and thereby vary, a memorandum, in writing, of a bargain for the sale of goods, not delivered at the time of the sale. That the memorandum stated the sale of merchandize to consist of a *bale of superfine broad cloths*, and the defendants below were permitted to offer evidence that the sale was of a *bale of superfine London broad cloths, of the west of England manufacture*. They contended, that parol evidence could not be admitted to contradict, add to, or vary the terms of a written instrument. They referred to *Rob. on Frauds*, 10, 11. 1 *Phillip's Evid.* 423, 436, 437, (note.) *Sugd.* 97. *Powell vs. Edmunds*, 12 *East*, 6. *Gardiner vs. Gray*, 4 *Campb.* 144. *Parkhurst vs. Van Cortlandt*, 1 *Johns. Chan. Rep.* 273, 281. *Meres vs. Ansel*, 3 *Wils.* 275. *Preston vs. Mercereau*, 2 *W. Blk. Rep.* 1249. *Wain vs. Warlters*, 5 *East*, 10. *Pantericke vs. Powlet*, 2 *Atk.* 383. *Rich vs. Jackson*, 4 *Bro. Chan. Ca.* 514. *Brodie vs. St. Paul*, 1 *Ves. jr.* 333. *Woollam vs. Hearn*, 7 *Ves.* 217. *Higginson vs. Clowes*, 15 *Ves.* 516. *Davis vs. Symonds*, 1 *Cox's Cases*, 402. *Weightman vs. Caldwell*, 4 *Wheat.* 69, (and notes.) *Grant vs. Naylor*, 4 *Cranch*, 224; and *Binstead vs. Coleman*, *Bunb.* 65.

R. Johnson and *Glenn* contended, that *Appleton* and *Poor* committed a fraud on the defendants in the sale of the cloths, and that parol evidence was admissible to prove that fact. They referred to *Lewis vs. Cosgrave*, 2 *Taunt.* 2. *Wilson vs. Hart*, 7 *Taunt.* 295. *Boring's Lessee vs. Lemmon*, 5 *Harr. & Johns.* 223. *Sides vs. Hilleary*,

A bill of parcels being considered evidence of a contract, and a sufficient memorandum in writing to take the case out of the statute of frauds, parol evidence cannot be received substantially to change it. Whether or not parol evidence can be received to establish fraud, and thereby, under particular circumstances, avoid a contract made in writing? *Quere.*

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(ante 86.) That by the statute of frauds the great outlines of the contract must be in writing; but the statute did not mean that parol evidence should not be received to fill up its details. They referred to *Johnson vs. Ronald's adm'r.* 4 *Munf. Rep.* 77. 1 *Phillip's Evid.* 410. *Saunderson vs. Jackson*, 2 *Bos. & Pull.* 239. *Cuff vs. Penn*, 1 *Maule & Selw.* 21; and *Keating vs. Price*, 1 *Johns. Cas.* 22.

MARTIN, J. delivered the opinion of the court. This action was founded on a contract alleged to have been made by *Appleton and Poor*, as the agents of *Richard Batturs*, the appellant, with *Abraham Sellers* and *John Patterson*, the appellees. At the trial, the plaintiff read to the jury, as evidence of the contract, a bill of parcels, in the following words: "*Baltimore*, Nov. 14th, 1814. Messrs. *Abr'm. Sellers* and *John Patterson*, bought of *Appleton and Poor*, one bale superfine broad cloths, viz.

No. 87, 89, 90, 95, 96, 97, 98.

8 ps. Bl'k. 153½

83, 84, 91, 92, 4 Blue 78½

85, 86, 93, 94, 4 Green 70½

302½ yds. 17. \$5142 50

Note 75 days, to be dated on the delivery of the goods." And proved, that the said bill of parcels, and also a pattern card containing the samples of the cloths sold, which had been cut off from the same, and were a part of the original quantity contained in the bale, were delivered to the appellees, and kept by them; that the said cloths were sold by the pattern card, and that the bale of cloths did, in all respects, correspond with the bill of parcels and card of samples. The plaintiff further proved, that *Appleton and Poor* tendered to the appellees the bale of cloths, as stated in the bill of parcels, and that they refused to receive the same. The defendants then offered parol evidence to prove, that *Poor*, when he proposed to sell the bale of cloths to them, represented them to be superfine *London* cloths, and that he guaranteed them to be such, and that he stated if they were not *London* cloths the appellees should not be obliged to accept them, and it should be no contract; that the bale of cloths were not *London* cloths, but only tolerable *Yorkshire* cloths, and that *London* cloths are of much

more value than *Yorkshire* cloths. They also offered to prove they did not agree to purchase by the pattern card, but purchased *solely* on the representation and *guarantee* that they were *London* cloths. To which parol evidence the plaintiff objected, but the court overruled the objection, and permitted it to go to the jury.

Whether the bill of parcels is written evidence of the contract, is not a question before us. By the decision of this court, on the former appeal between these parties, it was determined, that under the circumstances disclosed by the evidence in the case, *Appleton* and *Poor* were the agents of both parties; that the bill of parcels was evidence of the contract, and a sufficient memorandum, in writing, to take the case out of the statute of frauds.

Could parol evidence then be received to substantially change the contract thus reduced to writing?

This question is too well established to require exposition or authorities. It is not *now* open for discussion. That such evidence is not admissible, has been sanctioned by almost every tribunal both in *England* and this country, and if there is any legal principle that is considered at rest, and which ought not to be again disturbed, it is that now presented to us.

Judge *Thompson*, at the last term of the Supreme Court of the United States, in the case of *Renner vs. The Bank of Columbia*, 9 *Wheat.* 531, observes, "It is said the effect of this testimony is to alter and vary, by parol evidence, the written contract of the parties. If this is the light in which it is to be considered, there can be no doubt it ought to be laid entirely out of view, for there is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence to contradict, or substantially vary, the legal import of a written agreement."

Whether parol evidence can be received to establish fraud, and thereby, under particular circumstances, avoid a contract made in writing, is a question upon which we give no opinion, because we think it is not presented by this record. The parol evidence offered, was clearly intended to show a contract different from that in the bill of parcels; that the appellant, by tendering cloths, *such* as were described in the bill of parcels, was not entitled to recover, but he ought to have tendered *London* broad cloths,

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because, by his contract, he had guaranteed the cloths sold to be of that description; and this addition to, or variation of, the written contract, was to be proved by the parol evidence offered. Without torturing the language of the bill of exceptions, no other construction can be given to it.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

JUNE.

LAMBORN vs. WATSON.

A *fi fa.* on a judgment obtained by B against L, was placed in the hands of M, a sheriff, and by him laid upon the land of L, who, at the sale, perceiving that it would not sell for its real value at that time, entered into an agreement with W that he should bid it off for and upon L's account, to enable him thereby to gain time to raise the money. W did bid off the land at less than its value, but conceiving he designed of turning the purchase to his advantage, entered into a fraudulent agreement with M to retain it for their mutual benefit, and refused to relinquish it to L, who had made an arrangement with B for payment of the debt. For this violation of his agreement, L brought an action on the case, on the verbal agreement, against W, who rested his defence on the statute of frauds. *Held*, that the action, not being founded on deceit, misrepresentation or fraud, is within the statute of frauds.

Courts of law as well as of equity have cognizance of fraud, but courts of law relieve against it negatively, by inquiring into the circumstances, and not permitting plaintiffs to recover in actions brought on deeds or contracts fraudulently obtained, and thus virtually annulling such deeds or contracts as against the fraudulent parties. But they cannot entertain actions upon verbal contracts within the statute on the ground of fraud in refusing to perform them.

APPEAL from Harford county court. This was an action on the case, and the declaration alleged, that B. Bond had obtained sundry judgments against the plaintiff, (now appellant,) upon which writs of *feri facias* had been issued and placed in the hands of Jason Moore, then sheriff of the county, who in pursuance thereof had levied the same upon the plaintiff's property, and had advertised the same to be sold on the 19th of August 1817, on which day the plaintiff, with sundry persons attended; when in consideration that the property would not sell for its real value at that time, and to prevent its being sacrificed, the plaintiff did then enter into an agreement and understanding with the defendant, (now appellee,) to bid for the property for and upon account of the plaintiff, that he might have an opportunity to raise the money to pay the executions for which the property was to be sold; and in consequence of such agreement and understanding between the plaintiff and the defendant, the defendant did bid off the property for the sum of \$5000, which was more than sufficient to pay the whole of the executions to Bond, together with all costs, &c. Yet the defendant, not regarding his said agreement and undertaking, but contriving, &c. to defraud the plaintiff, on the said 19th of August aforesaid, and after the said sale, did secretly and fraudulently contrive, collude, and agree with Moore, the sheriff, to deprive the plaintiff of any benefit from the sale of the property, and to defraud him out of the same, he the defendant did then agree and determine with Moore to retain the property by virtue of the sale, for their mutual benefit and advantage, and in consequence thereof the defendant absolutely refused to relinquish the property to the plaintiff, although, &c. That

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the plaintiff was ready and willing to pay the money due upon the executions, &c. yet, &c. The defendant pleaded not guilty, upon which issue was joined. At the trial the plaintiff proved to the jury the facts stated in his declaration. And the defendant proved that the property mentioned in the declaration was real estate, and that the understandings and agreements in the declaration stated had relation only to real estate; and that said understandings and agreements were not, nor was either of them, reduced to writing, nor any memorandum or other writing made of the same, nor was there any money paid for or on account of the same or the said land by the plaintiff, or by any one else for him, to the defendant. The defendant then prayed the opinion and direction of the court to the jury, that if they believed said evidence, the plaintiff was not entitled to recover. Which opinion, the court [*Hanson and Ward, A. J.*] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

Mitchell, for the Appellant, stated, that the court below gave the direction to the jury, as prayed for by the defendant, on the ground that the agreement stated in the declaration and proved, was within the statute of frauds. He contended, that although it was a parol promise, it was valid, there being fraud alleged. He cited *The King vs. Boston*, 4 *East*, 577, (note b.) *Countess of Mountacuo vs. Maxwell*, 1 *P. Wms.* 618. 1 *Str.* 236, *S. C.* *Rob. on Frauds*, 195. 9 *Mod.* 36. *Crosbie vs. M'Doual*, 13 *Ves.* 154. That the consideration in the agreement was sufficient if it was for the benefit of the plaintiff, and was not prejudicial to the defendant; and that where a person undertakes to act in a trust he is answerable. He cited 1 *Com. Dig.* tit. *Action*, &c. (B 9.) 200. *Kirby vs. Coles*, *Cro. Eliz.* 157. That the evidence was admitted, and the agreement was proved as stated in the declaration; which was as certain as if the agreement had been in writing, or had been admitted in chancery by the defendant's answer, where the statute was never noticed, although insisted on by the defendant. That the statute of frauds was a statute of evidence, he referred to *Rob. on Frauds*,

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87, 88. That, where the defendant dispenses with the statute of frauds, and admits the agreement, it is established,

R. Johnson, for the Appellee, contended, that the declaration contained no averment that the defendant solicited the plaintiff to become the purchaser of the property for him. Nor was there any averment of a fraud intended to be perpetrated at the time of the agreement. That it was nothing more than the violation of contract, without any fraudulent motive. That as the agreement related to lands, it ought to have been in writing, and not being so, was within the statute of frauds. He cited 1 *Com. Cont.* 74. 1 *Bac. Ab.* tit. *Agreement*, (C) 115. That the statute of frauds is never pleaded, but is offered in evidence, and that it was with a view of relying on the statute that the defendant offered the evidence he did. That there was no averment in the declaration that the plaintiff had paid the money to the defendant, or that he was ready and willing, and offered to pay the executions. He cited 1 *Chitty's Plead.* 314, 315. 1 *Saund.* 320, (note 4.) 5 *Com. Dig.* tit. *Pleader*, (C 51,) 356.

Mitchell, in reply, contended, that no averment in the declaration of an offer to pay was necessary; that being ready to pay was equivalent to an offer to perform. He cited 1 *Chitty's Plead.* 318. That in *The King vs. Boston*, 4 *East*, 576, the fraud was after the agreement, and was similar to the case before the court. He referred to *Newl. on Cont.* 55. That wherever fraud enters into the transaction of a parol agreement, the statute of frauds could not be pleaded. He cited *Rob. on Frauds*, 130, and *Davis vs. Walsh*, in this court, at December term 1808.

The opinion of the court was delivered by

BUCHANAN, Ch. J. We must take this case, as we find it, which, as presented by the declaration, and bill of exceptions taken at the trial, is substantially this: Sundry writs of *fieri facias* being sued out, upon judgments obtained by *Buckler Bond* against *Daniel Lamborn*, the plaintiff, and placed in the hands of *Jason Moore*, the sheriff of *Harford* county, he levied them upon the land and real estate of *Lamborn*, who attended at the time and place assigned by the sheriff in his advertisement for the sale of the property; and perceiving that it would not sell for its

real value at that time, entered into an agreement with *John Watson*, the defendant, that he should bid it off, for and upon his, *Lamborn's*, account, to enable him thereby to gain time, to raise the money to satisfy the executions.

Watson did accordingly bid off the property at less than its value, but afterwards, conceiving the design of turning the originally pretended purchase to his advantage, entered into a fraudulent engagement with *Moore*, the sheriff, to retain it for their mutual benefit, and refused to relinquish it to *Lamborn*, who had made an arrangement with *Bond*, the creditor at whose instance it was seized, for the payment of the whole amount due to him, with all the accruing costs and charges.

For that violation by *Watson* of his agreement this suit was brought, and he rests his defence on the statute of frauds, which probably generates as many frauds as it prevents. The expedient resorted to by the plaintiff to prevent an actual sale, in order to gain time, may not be altogether free from exception; but looking at this case, as it appears in the record, more disgraceful conduct than that both of the defendant, and *Moore* the sheriff, has perhaps seldom found its way into a court of justice, and the defence set up is entirely of a piece with it; yet as the case is presented, we are constrained to sustain that defence. The action is not founded on deceit, misrepresentation or fraud, practised by the defendant, by which the plaintiff was tricked into a false confidence, and seduced into a contract by which he has lost his property; but on a verbal agreement, respecting the sale of lands, not sought for, or moving from the defendant, but procured by the plaintiff himself for his own purposes, on which, without overturning the statute of frauds, an action at law will not lie, being clearly within the statute, from the operation of which the subsequent abuse by the defendant, in collusion with the sheriff, of the confidence reposed in him, cannot have the effect to rescue it. If the plaintiff could be permitted to recover on this agreement, there is no case in which the statute could prevail, and it would become a dead letter.

Courts of law, as well as of equity, have cognizance of fraud; but courts of law relieve against it negatively, by inquiring into the circumstances, and not permitting plaintiffs to recover in actions brought on deeds or contracts

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fraudulently obtained, and thus virtually annulling such deeds or contracts as against the fraudulent parties.

But they cannot entertain actions upon verbal contracts within the statute, on the ground of fraud, in refusing to perform them; if they could, it would be to permit a plaintiff, in the shape of an action on the contract, to recover in damages, not for the breach of the contract as such, but for a fraud subsequently conceived, and on which the action was not founded, (as is attempted in this case,) which would be to annul the statute in relation to such contract.

JUDGMENT AFFIRMED.

JUNE.

McILHENNY, et al. vs. JONES.

Notice to the endorsee, of the non payment of a promissory note, is not necessary, where they had endorsed the note after the day of payment had elapsed, and where an action had been brought on it in their names, for the use of the holder against the drawer, and such action was by order of their attorney entered discontinued, and the note taken out.

APPEAL from *Washington* county court. *Assumpsit* on a promissory note by the endorsee against the payees. Plea, *non assumpsit*. At the trial the plaintiff, (the appellee,) offered in evidence the promissory note declared upon, drawn on the 10th of November 1817, by *George Beltz-hoover*, for \$105 39, and payable, 30 days after date, to the defendants, (the appellants,) or order, and by them endorsed, on 3d of June 1818, to the plaintiff. The making of the note, and the endorsement by the defendants, were proved. The plaintiff also offered in evidence a record of an action brought on a note of the same date, for the same amount, &c. on the 28th of April 1819, in the names of the present defendants, and endorsed for the use of *Jones* and *Roades*, against the drawer of the note; which action was, by order of the plaintiffs by their attorney, entered discontinued in March 1820, and the note, which had been filed, was taken out. The defendants then offered in evidence, that the maker of the note, at the time of the endorsement, and passing of the same by the defendants, lived near *Hager's-Town*, and that the plaintiff then was in *Hager's-Town*, and continued there for two or three weeks after, and that they endorsed the note in payment for goods purchased by them of the plaintiff; and on this evidence prayed the court to direct the jury, that the plaintiff was not entitled to recover. The court, [*Buchanan*, Ch. J. and *T. Buchanan*, A. J.] refused to give the direction. The defendants excepted, and the verdict and judgment being against them, they appealed to this court.

The cause was argued at June term last before EARLE, MARTIN, DORSEY, and STEPHEN, J.

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Ridout, for the Appellant, contended, 1. That due diligence was not used by the plaintiff below, to obtain payment from the drawer of the note, on which the action was brought, before instituting suit against the endorsors.

2. That notice was not given to the defendants of the failure of the drawer to pay the note.

R. Johnson, for the Appellee, contended, that as a suit had been brought by the defendants on the 28th of April 1819, against the drawer, on the very note which no doubt was left in their hands by the plaintiff for collection, they could not deny their having notice that the money had not been paid. They struck off their action, which was entered for the use of *Jones*. There was no necessity, therefore, to prove that they had notice of the nonpayment of the note by the drawer. The prayer made to the court below, by the defendants, was general, that the plaintiff was not entitled to recover, which the court very properly refused to grant. There was no evidence that the plaintiff received the note in payment of the goods purchased of him by the defendants. The taking a note is no evidence of payment, unless it is so expressed. *Whitbeck vs. Van Ness*, 11 *Johns. Rep.* 409. Whether or not it was received as payment, was a fact to be left to the jury. *Johnson vs. Weed*, 9 *Johns. Rep.* 310. *Chitty on Bills*, 118, (note.) Where a note is endorsed after it is due, the endorser becomes the maker. *Clark vs. Young*, 1 *Cranch*, 192. It is fair to infer, that when the note was endorsed the payees knew that the drawer would not pay. Notice to them therefore was not necessary that he did not pay when called on.

Ridout, in reply. It does not appear that the defendants had any thing to do with the suit which was brought against the drawer. It was entered for the use of *Jones*. The note too had been endorsed by them, and the action could not be supported in their names. It was the suit of *Jones* erroneously brought, and therefore his counsel dismissed it. There is no evidence that it was the same note upon which the present action is brought. There might be several notes of the same date, and of the same amount, &c.

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The note being endorsed, after it was due, makes it in one respect different from other notes, that is, that the holder could not look to the endorsors without proof of the insolvency of the drawer. If the endorser is considered as drawer, he has not been sued as drawer. As between the endorser and endorsee, it stands in the same situation as all other notes. *Chitty*, 141. If as drawer, he is entitled to notice, *Mutford vs. Walcot*, 1 *Ld. Raym.* 575. *Chalmers vs. Laniow*, 1 *Campb.* 383. This was the assignment of a note in payment of a debt. The same care and attention is therefore required, to make the assignor liable, as in all cases of promissory notes endorsed. If the note was accepted as conditional payment, still the same strictness is necessary to bind the assignor: *Chitty*, 157. To show that the same degree of diligence is necessary where a note is not regularly endorsed, or is not regularly a bill of exchange, he referred to *Chamberlynn vs. Delarive*, 2 *Wils.* 353. *Moore vs. Warren*, 1 *Str.* 415. *Turner vs. Mead*, *Ibid* 416. *Ward vs. Evans*, 2 *Ld. Raym.* 928. *Tobey vs. Barber*, 5 *Johns. Rep.* 68, 72. *Chitty*, 118, (note K.) *Clark vs. Young*, 1 *Cranch*, 192.

Curia adv. vult.

At this term

JUDGMENT AFFIRMED.

JUNE.

JARRETT'S LESSEE vs. COOLEY, et al.

Under the act of 1786, ch. 45, to direct descents, and its supplements, a purchaser of the interest of the intestate, &c. of an intestate, has a right to elect to take the intestate's real estate at the valuation of it by the commissioners. A legal estate in severalty does not vest in a party electing to take under the said act of descents, unless he pays the other heirs their proportions of the valuation of the estate or executes bonds to pay the same.

APPEAL from *Harford* county court. The cause, which is fully stated in the opinion delivered by this court, was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J. by

Magruder and *R. Johnson*, for the Appellant, and by *Mitchell*, for the Appellees.

The opinion of the court was delivered by

EARLE, J. This is an ejectment instituted in *Harford* county court, for the recovery of an undivided sixth part of a tract of land called *Rupulta*.

The plaintiff gave testimony to support his right to recover, and rested his cause upon his proofs. To defeat his

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title the defendants, *Charles & Carvil Cooley*, contended, that the whole tract called *Rupulta* had become the several estate of one *William Mitchell*, in virtue of a proceeding in *Harford* county court, under the descent laws. In support of the defence, they offered in evidence a record of *Harford* county court, showing that one *James Mitchell* died seized and intestate of *Rupulta*, and other lands, in 1798, leaving six children, *Martin*, *Bennett*, *Kent*, *Harriet*, *James*, and *Aquila Mitchell*, the two last of whom were minors under twenty-one years of age; that a petition was filed in 1809, for the partition of the intestate's lands between his heirs and the said *William Mitchell*, who is stated to have been a purchaser under *Martin Mitchell*, the eldest son; that it was so far proceeded on, that at March term 1810, the commissioners returned, that the land of the deceased would not bear division without loss to all the parties concerned, and they valued the tract called *Rupulta* to the sum of \$7830. And showing further, that the return was confirmed by *Harford* county court at the August term following, when *William Mitchell* being a purchaser under *Martin Mitchell*, the eldest son, elected to take the whole estate of the intestate, including the tract called *Rupulta*, at the valuation of the commissioners. And the defendants then moved the court to direct the jury, that the record and proceedings exhibited, and the matters therein contained, divested the title of the children and heirs of *James Mitchell* in the tract called *Rupulta*, and vested the title thereof in *William Mitchell* therein named. Which direction the court gave to the jury, and the plaintiff excepted. This opinion of *Harford* county court we have now to examine. On the argument it was urged by the plaintiff's counsel, that the direction ought not to have been given, because the election by *William Mitchell* was defective in not stating that he engaged to pay to the children of *James Mitchell* their just proportions of the value in money; and because it does not appear in the record read in evidence, that he in fact paid them their proportions of the value, or gave bonds to them for the same, with two or more sufficient securities approved by the court.

The manner of making the election, and vesting the legal estate in the party electing, are provided for by the acts of 1786, *ch.* 45, and 1802, *ch.* 94.

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By the first act, after the return and judgment of the commissioners are confirmed by the court, the eldest son, child, or person entitled, shall have election to take the whole estate, and to pay to the others their just proportions of the value in money; and by the last act shall give bond, with two or more sufficient securities, to be approved by the court, to the other person or persons entitled to the estate, for their several proportions of the sum of money at which the estate is valued.

The act of 1786, we think, was substantially complied with by *William Mitchell*, the purchaser under *Martin Mitchell*, the eldest son. He elected to take the whole estate of the intestate at the valuation set on it by the commissioners, and thereby necessarily elected or engaged to pay the other heirs their just proportions of the value in money. By the law, no proceedings of the commissioners shall be set aside for matter of form, and it could not have been intended by the legislature, that much technicality should be observed by the party, in his compliances with the requisitions of the act. The design of the election is to vest the legal estate in the party electing, and to oblige him to pay to the other heirs their just proportions of the value in money; and when those objects are attained, it matters not by what form of words they are effected. It does not appear that *William Mitchell*, the purchaser under *Martin Mitchell*, paid the other heirs of the intestate their proportions of the value in money, or passed to them bonds for the same, and for this reason the court are of opinion, that the legal estate in fee, in the tract called *Ru-pulta*, has not vested in him in severalty. The payment of the purchase money, or the giving of bonds for the same, we consider indispensable requisites to be complied with, to vest the legal estate in the party electing. As to the bonds, the expressions of the act of 1802, *ch. 94*, are explicit; and for the greater security of the other heirs, they are thereby made liens upon the land elected to be taken; and giving them, when the money is not paid down, we must view as a pre-requisite to settling the legal estate in the person electing. The case of *Stevens vs. Richardson*, (*ante* 156,) did not directly decide this question, and we therefore represented it to be a point still open for discussion.

In that instance bonds were passed by the husband, who

elected to take in right of his wife, and the court adjudged, that the legal estate in fee vested in him, without paying the purchase money, secured by the bonds, to the heirs, on obtaining a deed from the commissioners. But it was not argued before the court, nor was it expressly decided by them, that the giving of bonds was an indispensable requisite to vest the legal estate in fee in the person electing. This question we now, however, propose to put at rest, by declaring it to be our unanimous opinion, that a legal estate in fee in the land elected to be taken, cannot vest in the party electing to take and pay the value, without his actually paying the other persons entitled their just proportions of the value in money, or giving bonds to them for the same, agreeably to the act of 1802, *ch.* 94.

We reverse the judgment of *Harford* county court, and direct a *procedendo* to issue.

JUDGMENT REVERSED, &c.

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MOTION for a rule to show cause why an execution should not issue on a judgment affirmed in this court at June term 1819, on an appeal from *Charles* county court, from a judgment rendered therein, in an action of debt brought by *Smith* against *Dorsey*. After the affirmance of the judgment in this court, *Dorsey* obtained an injunction to stay proceedings thereon. The injunction was continued by the chancellor until final hearing in May 1824, when he decreed, "that unless the complainant shall, on or before the 13th of May next, pay to the defendant the sum of \$5867 25, with interest, &c. "the injunction heretofore issued shall be dissolved," &c. From that decree *Dorsey* appealed to this court, and entered into the following appeal bond, which was approved by the chancellor. "Know all men," &c. and after reciting the decree and appeal therefrom, proceeded as follows: "The condition of the obligation is such, that if the said *Clement Dorsey* shall not well and truly prosecute the said appeal, and also pay and satisfy to the said *Charles S. Smith* the amount of the debt as stated in the proceedings aforesaid, with interest and costs, in case the said decree shall be affirmed, and also all costs and damages that may be awarded by the court of appeals aforesaid, or shall arise by reason of the appeal

S, obtained a judgment in the county court against D, which was removed to and affirmed in the court of appeals. D afterwards obtained an injunction to stay proceedings thereon, which was continued until final hearing, when the chancellor decreed, that unless D should on or before, &c. pay to S a certain sum of money, with interest, &c. the injunction should be dissolved. D appealed from that decree, and entered into an appeal bond, which was not, in point of form, agreeably to the act of 1713, *ch.* 4, but was approved by the chancellor. On motion of S for a rule on D, to show cause why an execution should not issue on the judgment of affirmance, notwithstanding the appeal from the decree of the chancellor, and the approval of the appeal bond—Rule refused.

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aforsaid, then," &c. The motion was argued, (after notice, &c.) before BUCHANAN, Ch. J. EARLE, MARTIN, and ARCHER, J.

Ashton & R. Johnson, in support of the rule, contended,

1. That the court of chancery had no right to take a bond which could operate as a *supersedeas* to stay execution.
2. That the bond which had been taken was informal.
3. That if the bond operated to stay execution, it was only on the decree of the chancellor, and this was a decree upon which no execution could issue; but that it did not operate to stay execution on the judgment at law. They insisted, on the *first point*, that no bond could be given unless it was demanded by statute. That the acts of July 1721, *ch. 14, s. 4*; July 1729, *ch. 3, s. 3*; 1785, *ch. 72, s. 27*; provide for appeals from the court of chancery, but there is no mention made in them as to the bond to be given. It is admitted, that an appeal in *England* operates as a *supersedeas* without a bond being given; and there is no objection to its doing so here on the decree of the court of chancery, but it cannot have the effect to stay execution on the judgment at law. The act of 1713, *ch. 4*, is applicable only to judgments at law, and the bond in this case cannot be brought within its provisions. On the *second point*. The bond is not in form, if the court of chancery had a right to take one. Unless the bond is in the form prescribed by law, execution may issue. *Johnson vs. Goldsborough*, 1 *Harr. & Johns.* 499. The bond is defective in various particulars—it is made payable to *Smith*, omitting his executors, &c. The act of assembly is not referred to in the bond, but is wholly omitted. The word *effect* is also omitted. It is a material word, as the words to *prosecute the appeal with effect*, were held in *Karthaus vs. Owings*, (*ante* 134,) to mean to prosecute the appeal to a successful termination. The act of 1713, *ch. 4*, prescribes a *formula* which must be substantially if not strictly pursued—and so decided as to *femes covert* in *Hawkins et al. Lessee vs. Burress et al.* 1 *Harr. & Johns.* 513, where the word *ill-usage* was omitted; also in *Lewis's Lessee vs. Waters*, 3 *Harr. & M'Hen.* 430, where the word was *treats* instead of *threats*; also in *Smoot's Adm'r. vs. Bunbury's Ex'r.* 1 *Harr. & Johns.* 136, where the words *or any security* were omitted in the probat to an account; so also in *Shivers vs. Wilson*, 5 *Harr. & Johns.* 130,

where the form of the oath was not pursued. On the *third point*. The bond, if correctly taken, does not operate to stay execution on the judgment at law. The decree is one on which no execution can issue, and the bond, if to stay execution, must be on the decree upon which it operates, and not the judgment at law, with which it has nothing to do. The injunction being dissolved, there is nothing to stay execution on the judgment at law.

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Magruder and *Taney*, against the rule. The right to issue execution on the judgment at law, is derived from the decree of the chancellor dissolving the injunction. That decree is suspended by the appeal, and bond being approved, all proceedings under the decree are suspended until a hearing in this court. What will be the decree in this court if the decree of the chancellor is reversed? Not that the injunction be revived, but that it be perpetual. The practice has universally been, that a bond in a case like the present, stays execution on the judgment at law. The party appeals as well from that part of the decree dissolving the injunction, as the part decreeing the sum of money that is due. In *England* no bond is required on appeals from chancery; but the appeal itself stays execution of the decree; and as the appeal itself, independent of a bond, is a *supersedeas*, the party, to entitle himself to an execution, must show that there is some law requiring a bond to be given. This is not a case where any bond was required to be given; but if a bond is necessary, and the one given is defective, this court would do what the chancellor would do—call on the defendant to give a correct one by a particular time. Why should a bond be given? One has already been given on obtaining the injunction, and none other is required. If the decree had given costs, then, to stay execution on the decree, a bond would be necessary. There are many cases where the party might appeal from a decree where no bond can at all be necessary. The question on the appeal in this case will be, whether or not the injunction ought to have been continued; and until decided on by this court the injunction must continue. The bond being approved by the chancellor, shows that it is the form usually given on appeals from decrees in chancery. If the form prescribed by the act of 1713 has not been literally complied with, it has been sub-

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stantially so. It covers every possible loss which *Smith* can sustain.

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RULE REFUSED.

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HARDING vs. STEVENSON.

A transfer of property by a debtor to a creditor, with a view, or under the expectation of becoming an insolvent debtor, is made void by the act of 1812, ch. 77, s. 1, only for the purpose of vesting the property in the trustee of such debtor for the benefit of his general creditors. Money, specific pieces of coin, which are tangible, may be taken in execution, the actual possession and ownership being in the defendant; but money in the hands of a sheriff cannot be taken by him under a *feri facias* against the person who is entitled to receive it. Though in such case, if the sheriff brings the money into court, he will be directed to pay it to the creditor, whose execution is in his hands against the property of him for whom it was levied.

A mere *chase in action* is not subject to execution.

An execution cannot be levied on the lien a judgment creditor has upon the lands of his debtor. So, though a *feri facias*, from the time it is placed in the hands of the sheriff, binds the personal property of a debtor, yet an execution on a judgment against his creditor, cannot be levied upon the property so bound.

Where property had been consigned to A, who had acquired a lien only as consignee and pawnee, an execution sued out against him, cannot be legally levied on such property.

APPEAL from *Baltimore* county court. This was an action on the case against a sheriff for a false return. The case was this:—At March term 1818, of *Baltimore* county court, the plaintiff, *Harding*, recovered judgment against a certain *Hugh Boyle*, for the sum of \$3000, with interest from the 23d of July 1816; and costs, which was affirmed at June term 1819, in the court of appeals, with stay of execution until the 15th of December in same year. On the 16th of December 1819, a writ of *feri facias* issued on this judgment, and on 20th of same month was placed in the hands of the defendant, (now appellee,) then sheriff of *Baltimore* county. *Boyle* was in possession and proprietor of 367 hogsheads of molasses, which arrived in *Baltimore* on the 16th of December 1819 from *Havanna*, and *Boyle* arrived on the same day from the same place. On the 17th of December 1819, *Boyle*, by deed, conveyed all his interest in said 367 hogsheads of molasses, to a certain *David Winchester*, reciting in that deed, that “whereas there were shipped at *Havanna*, in the island of *Cuba*, by Messrs. *Gray*, *Fernandis* & *Brother*, of that place, merchants, on board the ship *Mohawk*, now lying at the port of *Baltimore*, 367 hogsheads of molasses, consigned to the said *Hugh Boyle*; and whereas the said *Hugh Boyle* advanced, at the island of *Cuba* aforesaid, on account of the purchase of the said cargo of molasses, or for account of the said *Gray*, *Fernandis* and *Brother*, the sum of \$7886, to be reimbursed and paid to him out of the sales of the said molasses, over and above the regular and usual commission upon such sales.” The deed then, in consideration of \$7886, transfers to *Winchester* the 367 hogsheads of molasses, in trust, to sell the same, and out of the proceeds of the sale to retain his commissions, and the said sum of \$7886, with interest, and the surplus, to pay over to *Gray*, *Fernandis* & *Brother*, &c. The interest of *Boyle* in the molasses was truly

stated in the deed, and the molasses was delivered in pursuance thereof. At the time of making the deed, *Boyle* contemplated being and becoming an insolvent debtor, and made the deed with the view and under the expectation of being and becoming an insolvent debtor. The molasses did not sell for the amount of *Boyle's* advances. On the 20th of December 1819, the molasses was shown to the defendant, who levied the aforesaid writ of *fieri facias* on 100 hogsheads thereof, but the same being claimed by *Winchester* under said deed, the defendant made return of *nulla bona* on said writ to the court of appeals. *Boyle*, on the 31st of December 1819, applied for the benefit of the insolvent laws, and obtained a final release. The value of the whole quantity of molasses, free from charges, was \$4000, and of the 100 hogsheads levied on, was \$2000. A judgment *pro forma* was entered for the defendant, and the plaintiff prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

R. Johnson and *Glenn*, for the Appellant, contended, 1. That the transfer from *Boyle* to *Winchester* was fraudulent, and void in law, against the creditors of *Boyle*, and that the whole of the molasses so transferred was liable to be taken under the *fieri facias*.

2. That the return of *nulla bona* on the *fieri facias* was a false return as to the whole of said molasses, or as to the 100 hogsheads levied on.

3. That *Boyle* had such an interest in the said property as was liable to execution.

To show that *Boyle's* interest was liable to execution, they cited 3 *Coke*, 12. *Comb.* 356. *Turner vs. Fendall*, 1 *Cranch*, 133, 134. *Handy vs. Dobbins*, 12 *Johns. Rep.* 220. That *Boyle* had a legal estate, being mortgagee in possession. That the deed was void under our insolvent laws, they referred to the acts of assembly of 1803, *ch.* 110, *s.* 9; 1807, *ch.* 55; and 1812, *ch.* 77. *Bowyer vs. Bampton*, 2 *Stra.* 1155. *Low vs. Waller*, *Doug.* 726. *Doe vs. Gooch*, 3 *Barnw. & Ald.* 664. That a gift made to deceive one creditor was void as to all. *Gooche's case*, 5 *Coke*, 60. *Moor*, 615. That the deed being void, the plaintiff's execution was a lien, and the trustee took, subject to

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this lien. *Taylor vs. Wheeler*, 2 Vern. 564. *Hinton vs. Hinton*, 2 Ves. 633. *Brown vs. Heathcote*, 1 Atk. 162. *Russell vs. Russell*, 1 Brown's Ch. Ca. 269. The plaintiff is like a creditor threatening to sue under the bankrupt law, who thereby acquires a fair and maintainable preference, but if the debtor voluntarily conveys, it makes him bankrupt. *Alderson vs. Temple*, 4 Burr. 2235. *Hannan vs. Fishar*, Cowp. 117. *Thompson vs. Freeman*, 1 T. R. 155.

Wirt, (Attorney General U. S.) and *Tuney*, for the Appellee, contended, that *Boyle's* interest in the molasses was not a tangible interest, which could be seized under a *fieri facias* or attachment. That it was strictly a *chose in action*. They referred to *M'Combie vs. Davies*, 7 East, 5. That if the property was liable to execution, then *Boyle* had an interest therein which he could transfer. They cited *Kennedy vs. Boggs*, 5 Harr. & Johns. 403:

The opinion of the court was delivered by

BUCHANAN, Ch. J. In seeking to sustain this suit, it has been contended by the counsel on the part of the plaintiff; that, as *Hugh Boyle*, on the 17th of December, in the year 1817, when he executed the deed to *David Winchester*, intended to take the benefit of the insolvent laws of the state, and did, on the 31st of the same month, make application, and ultimately obtained a final release, the deed to *Winchester*, under the operation of the first section of the act of 1812, ch. 77, became null and void, and the molasses, thereby intended to be transferred, liable to seizure and sale by the defendant, in virtue of the writ of *fieri facias* then in his hands, which had been before issued upon the judgment obtained by the plaintiff against *Boyle*. But they are met at the threshold by the decision of this court in *Kennedy vs. Boggs*, where it was held, that a transfer of property by a debtor to a creditor, with a view, or under the expectation of becoming an insolvent debtor, is made void by that act only for the purpose of vesting the property in the trustee of such debtor, for the benefit of his general creditors. And it is certainly in consonance with the policy and spirit of the law, that it should be so. If it were otherwise, the effect would be, to divest one creditor of the property, having equal equity, and to cast it into the hands of another, who may first obtain judgment and execution, which could not have been the intention of

the legislature; for if the debt of one creditor is to be satisfied to the exclusion of all others, it cannot be very material to the rest, whether it be by means of an execution, or of an immediate transfer of the property by the debtor himself.

But if the deed to *Winchester* should be admitted to be null and void to all intents, and not to the end only, of vesting the property in the trustee of *Boyle*, it would not avail the plaintiff.

Money, specific pieces of coin, which are tangible, may be taken in execution, the actual possession and ownership being in the defendant; but money in the hands of a sheriff, cannot be taken by him, in virtue of a *fieri facias* on a judgment against the person who is entitled to receive it. *Turner vs. Fendall*, 1 *Cranch*, 134; because, though he has a right to the sum levied, and has his action against the sheriff if he fails to pay him the amount, yet he has not the legal ownership of the specific money received by the sheriff, until it is actually paid over to him. Though in such case, if the sheriff brings the money into court, he will be directed to pay it to the creditor, whose execution is in his hands against the property of him for whom it was levied. A mere *chose in action* is not subject to execution, he who has the right, not being in possession, which he can only obtain by legal judgment and execution.

It was well observed at bar, that an execution cannot be levied on the lien a judgment creditor has upon the lands of his debtor. So, though a *fieri facias*, from the time it is placed in the hands of the officer, binds the personal property of a debtor, yet an execution on a judgment against his creditor, cannot be levied upon the property so bound.

The land in the former case cannot be taken in execution and sold to satisfy a judgment against him who has the lien, because the legal title is not in him; nor the personal property in the latter, because the legal title is not in him by whose execution it is bound.

In this case it appears, that the molasses in question was shipped by Messrs. *Gray, Fernandis & Brothers*, from *Havanna* to *Baltimore*, and consigned to *Hugh Boyle*, who had advanced for the purchase of it, on their account, \$7886, to be reimbursed and paid to him out of the sales thereof, over and above the regular and usual commission

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upon such sales; whereby he acquired a lien, in the two-fold capacity of consignee and pawnee, to the amount of his commission and the sum advanced, without having a legal title to the molasses itself, but only a lien, which he could not transfer by a pledge of the molasses as his own, and was not subject to execution. The defendant, therefore, had no right, and could not legally have levied on the molasses the *fieri facias* sued out by the plaintiff upon his judgment against *Boyle*, if the deed to *Winchester* had not been made.

JUDGMENT AFFIRMED.

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THE STATE vs. DASHIELL.

The act of assembly of 1821, ch. 244, directing the removal of criminal causes from Baltimore city court to Baltimore county court, and from Baltimore county court to Baltimore city court, is repugnant to the constitution, and therefore void

ERROR to *Baltimore* county court for the removal of a criminal prosecution for an assault and battery, in which a verdict was found for the state, and judgment thereon arrested. To reverse the decision of the county court the present writ of error was brought on the part of the state.

The case, which is stated in the opinion delivered by this court, was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J. by

T. B. Dorsey, (Attorney-General,) and *Nicholas*, on the part of the state, and by

Taney and *Tyson*, for the defendant in error.

As the opinion of the court was grounded on the constitutionality of the act of 1821, ch. 244, it is considered unnecessary to notice the various points urged in argument by the counsel concerned in the case; one of which, on the part of the defendant in error was, that the *record* had not been transmitted to the adjoining county court for trial, according to the act of 1804, ch. 55, s. 3, but a *transcript* only had been sent, and therefore the case was not legally before the court for trial and judgment.

The opinion of the court was delivered by

MARTIN, J. At November term, 1823, an indictment was found in *Baltimore* city court, against *George Dashiell*, for an assault and battery on *Anne G. Dorsey*. *Dashiell* presented to the court a suggestion, in writing, supported by affidavit, stating he could not have a fair and impartial trial

in that court, and prayed that the record and proceedings against him might be removed to an *adjoining county court*, for trial. Upon this prayer, the judges of *Baltimore city court* ordered the record and proceedings to be transmitted to *Baltimore county court* under an act of assembly passed in the year 1821, *ch. 244*. A trial took place in that court at March term 1824, and *George Dashiell* was found guilty of the offence charged against him. A motion was made in arrest of judgment, because the act of 1821, *ch. 244, s. 2*, (under which the removal was made,) was unconstitutional and void, and the judges of *Baltimore county court* had no jurisdiction to try the prosecution. This motion was sustained; and a writ of error has been brought on the part of the state to review that decision.

The act of 1804, *ch. 55*, being confirmed by the act of 1805, *ch. 16*, became a part of the constitution of this state, and its provisions could be altered *only* by an act of assembly that had received the sanction of two successive legislatures. By the *third section* it is enacted, "That if any party presented or indicted in any of the county courts of this state, shall suggest, in writing, to the court in which such prosecution is depending, that a fair and impartial trial cannot be had in such court, it shall and may be lawful for the said court to order and direct the record of their proceedings, in the said prosecution, to be transmitted to the judges of any *adjoining county court* for trial, and the judges of such *adjoining county court*, shall hear and determine the same, in the same manner as if such prosecution had been originally instituted therein; and provided, that such further and other remedy may be provided by law in the premises as the legislature may direct and enact."

This section was intended to secure to every person charged with a criminal offence, in the courts of this state, a fair and impartial trial; and to attain this object, the courts are directed, upon a suggestion being made in writing, that a fair and impartial trial cannot be had in the court, to whom the suggestion is made, to remove the record and proceedings from the court in which the presentment had been found, to an *adjoining county court for trial*. Thus to enable the party accused to make his defence before a *different jury* from that to which it must have been submitted without this provision, and before a jury summoned by a *different officer*. The right of removal from one coun-

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ty to another to obtain a fair and impartial trial, *where life, liberty and fame, may be endangered*, is a great and inestimable privilege. It is one of the most prominent and valuable features in the judiciary system, and, as before observed, was intended to be as permanent as any other part of the constitution. The provisions of the act of 1804, like all other constitutional provisions, are in general terms, and it is the province of the legislature by law, to point out in detail how those provisions are to be carried into effect. This was the sole object of the act of 1805, *ch. 65*, and is so declared to be, in the preamble of that law.

The necessity of laws, to carry into practical effect, the general provisions of the constitution, is felt by every one conversant with courts of justice. The trial by jury is secured by the constitution, but that would be a mere dead letter without the aid of the legislature to direct the manner it should be conducted.

The act of 1804 secures the general right of removal from one county court to the court of an adjoining county; the act of 1805 does not attempt to deprive the party of this right, but only points out the manner and terms upon which it shall be enjoyed. It is not repugnant to the act of 1804, but only directs, in detail, how the general provisions of that act shall be carried into operation.

The act of 1809, *ch. 138, s. 20*, is clearly a legitimate exercise of the power given to the legislature by the proviso in the 3d section of the act of 1804, *ch. 55*. It appoints a further and other remedy to secure a fair and impartial trial, but does not interfere with the right of removal from the court of one county to that of another county. The act of 1804 only provides for the removal of the prosecution, when the presentment is found in a county court, and this excited doubts—whether it authorised a removal from other courts, having criminal jurisdiction, as for instance, special courts of oyer and terminer, &c. The act of 1809 only extends the power of removal to every court having criminal jurisdiction, and thereby gives a *further and other remedy*, the act of 1804 having confined it to county courts.

It has been conceded by the counsel on both sides, and indeed is a position that cannot at this time be controverted, that if the act of 1821, *ch. 244*, is repugnant to the constitution of this state, it is the duty of this court to de-

declare it null and void. In the *second section* it is enacted; "That in all cases of suggestion and affidavit for removal of criminal causes from *Baltimore city court*, the judges of the said court shall have authority to order the same to be removed to *Baltimore county court*, as if the said court were in an adjoining county; and that in all cases of suggestion and affidavit for removal of criminal causes from *Baltimore county court*, the judges of said last court shall have authority to order the same to be removed to *Baltimore city court*, as if said last court were in an adjoining county."

This law authorises *Baltimore city court*, upon applications for the removal of prosecutions, to send the same for trial, not to an *adjoining county court*, but to *Baltimore county court*; and invests *Baltimore county court* with authority, upon applications being made to them for removal, to transmit the record to *Baltimore city court* for trial— This is said to be a further and other remedy under the proviso in the 3d section of the act of 1804, *ch. 55*: The evil complained of, and to be remedied, was, that a party accused was compelled to try the prosecution against him in the county court in which the presentment was found, although he was satisfied he could not *there* have a fair trial, from prejudices that might extend over the *whole county*, or be entertained by the sheriff who returned the jury for that county. The *constitutional* remedy was to remove the trial to *another county*, where it was to be presumed those prejudices did not exist, but which would, at all events, secure the party a trial before a jury summoned by a different officer. The act of 1821 declares, that the removal shall not *of right* be to *another county*, but one court may remove the trial to another court, *both in the same county*, where the same persons may be summoned as jurors, and where the same sheriff must return both juries. This is not a further or other remedy; in fact it is *no remedy*, but a denial of a constitutional right; for although the prosecution is removed, the trial must be had before a jury of the *same county*, and returned by the *same* officer, and the party accused may become as much the victim of prejudice as if the trial had been in the court where the presentment was found.

The constitution directs the removal to *another county*, to avoid the prejudices that may exist in the county where

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the presentment is found. The act of 1821 declares the court shall not be bound to remove it to *another* county, but to a court in the same county, whatever prejudices may be there against the party. The constitution declares that the party accused shall have a right of trial before a jury, composed of men from a *different* county, and summoned by a *different* sheriff; the act of 1821, although it grants a removal, sends it for trial before a jury taken from the same county, perhaps composed of the same individuals, and certainly returned by the same sheriff. The act of 1821 empowers the court to *refuse* the removal of a prosecution to an adjoining county. This right is secured by the constitution, to the party, to enable him to obtain a fair and impartial trial. The act of 1821, is therefore repugnant to the constitution—It is violatory of both its letter, and spirit, and can have no legal effect.

This court concur in opinion with the judges of *Baltimore* county court, and affirm their proceedings.

JUDGMENT AFFIRMED.

JUNE.

BENSON vs. DAVIS's Adm'r.

If a plaintiff is laid under a peremptory rule to file his declaration by a particular day, and he fails to comply, the court may order a *non pros.* to be entered against him. But if the declaration is received, and a rule laid on the defendant to plead to it, it is then too late for the defendant to complain.

APPEAL from *Montgomery* county court. This was an action on the case, brought to March term 1820. At that term the defendant, (the appellee's intestate,) appeared, and a rule was laid on the plaintiff, (now appellant,) to file his declaration, and he had until the first Monday of the next term to do so. At the next term, (November 1820,) the plaintiff had further leave to declare until the first Monday of March term 1821. At that term the plaintiff did declare, and a rule was laid on the defendant to plead by the first Monday of the November term 1821. At that term the record states, that it appeared to the court that the declaration of the plaintiff was not filed on or before the first Monday of March 1821, but on the 18th of May of the same year; and because the declaration was not filed on or before the first Monday of March 1821, the court entered a judgment of *non pros.* From that judgment the plaintiff appealed to this court. The appellee having died during the pendency of the appeal, his administrator was made a party.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

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B. Forrest, for the Appellant, referred to *Briscoe vs. Ward*, 1 Harr. & Johns. 165.

Magruder, for the Appellees.

The opinion of the court was delivered by

MARTIN, J. If there are any rules of practice in *Montgomery* county court, that justify the procedure in this case, they ought to have appeared in the record.

In their absence, we cannot conceive upon what principle the judgment of *non pros.* was entered.

In this case it appears the plaintiff was ruled to file his declaration by the first Monday in March 1821. On this day the March term commenced, and must have been continued or adjourned to the following May, for we find the declaration was filed on the 18th of May, and a rule laid on the defendant to plead, *as of March term.* The case was continued *under the rule to plead* to November term, when the court ordered a judgment of *non pros.* to be entered against the plaintiff, because he had not filed his declaration by the first Monday in March. In this we think they erred.

If a plaintiff is laid under a peremptory rule to file his declaration by a particular day, and he fails to comply with that rule, the court may, upon the prayer of the defendant, order a *non pros.* to be entered against him. But if the declaration is received, and a rule laid on the defendant to plead to it, it is certainly *then* too late to complain. The defendant has waived his right to take advantage of the *laches* of the plaintiff, and the court has assented to it.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

LYLES vs. LYLES'S EX'RS.

JUNE.

APPEAL from *Prince-George's* county court. This suit was instituted for the purpose of recovering from the defendant, (now appellant,) 32 hhds. of tobacco, alleged to be due from him to the testatrix of the plaintiffs, for four

If a contract is made for the payment of tobacco, which is not complied with, the plaintiff, in *assumpsit* on that contract, may recover the value of

the tobacco in money.

Whether or not since the act of 1812, ch. 135, s. 3, a judgment can be entered for tobacco?

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years rent of a tract of land, and the amount of two promissory notes drawn by the defendant, and made payable to the said testatrix. The declaration contained several counts—1. *Indebitatus assumpsit* for a special undertaking to pay 32 hds. of tobacco for four years use and occupation of a tract of land. The *assumpsit* being charged as made in the life-time of the testatrix, and to be paid in tobacco in kind. 2. Like the first, except that the promise is charged in money, and upon a *quantum meruit*. 3. Like the first, except that the charge is only for one year's use and occupation, and the *assumpsit* in money. 4. In the usual form, upon a receipt in the nature of a promissory note for \$1700, drawn by the defendant, and made payable to the testatrix of the plaintiffs. 5. In like manner upon another promissory note for \$666 67, drawn and payable as the former. Then follow the usual money counts for money had and received, lent and advanced, and paid, laid out and expended, and the declaration concludes generally to the damage of the plaintiffs of \$10,000 in money only. The defendant pleaded three pleas. 1. The general issue to the whole declaration. 2. An account in bar to the amount of \$830 35, due from the testatrix; and 3. An account in bar to the amount of \$1389 33, due from the plaintiffs. Issues were joined on all these pleas.

At the trial, the plaintiffs in support of the issues joined upon the *first*, *second*, and *third* counts of their declaration, gave in evidence an agreement in writing as follows, viz. "I hold myself bound to pay to my mother, Mrs. Sarah Lyles, every year during her life, from the 1st of January 1817, eight hogsheads of crop tobacco, for the use of the plantation on *Piscataway* creek, left me by the will of my deceased father. Given under my hand this 17th January 1818.

W. H. Lyles.

And proved the occupancy for four years, commencing on the 1st of January 1817, in pursuance of the said agreement. They further gave evidence of the value of said tobacco at the several times when by the terms of the contract it ought to have been delivered. The defendant then prayed the opinion of the court, that from the evidence and pleadings the plaintiffs were not entitled to recover the value in money of the tobacco. Which opinion the court,

[*Stephen*, Ch. J. and *Key*, A. J.] refused to give; but were of opinion, and so instructed the jury, that the plaintiffs were entitled to recover such value. The defendant excepted. The jury found for the plaintiffs on the *first* issue, and for the defendant on the *second* and *third*; and after deducting the defendant's accounts in bar from the plaintiffs' demands, assessed the plaintiffs' damages to the sum of \$4025 27. Upon this verdict the court gave judgment for the plaintiffs generally, for their damages and costs; and the defendant appealed to this court.

The cause was argued before BUCHANAN, Ch. J. EARLE, and MARTIN, J.

Ashton and *Stonestreet*, for the Appellant. 1. As the whole declaration sounds in contract, and the charge in the *first* count is of an express undertaking to pay tobacco in specie, and all the proof on the part of the plaintiffs below, (except as to the two notes,) sustained the charge as stated in the first count, the court below ought not to have instructed the jury that they might ascertain the value of the tobacco in current money, and give their verdict also in current money as a necessary consequence. 2. The breach of the promise laid in the *first* count is for the nonpayment of tobacco, without averring it to be of any particular value in money; and the conclusion of the declaration is generally to the damage of the plaintiffs in money alone. 3. There was no evidence to support either the *second* or *third* or last counts in the declaration. 4. If the value of the tobacco could be recovered in money, it should have been the value at the time of the verdict, and not at the day of payment by the contract, as directed by the court below. That where the contract, upon which the suit is brought, was for the payment of tobacco, money could not be recovered—They referred to *Skirvan vs. Willis*, 4 Harr. & M. Hen. 483, and *Stuard's adm'r. vs. Deale*, in this court, at December term 1808. That crop tobacco was as current in this state as money, and had been so for a century past—They referred to the acts of 1713, ch. 3, s. 11; 1724, ch. 6; 1763, ch. 18; 1779, ch. 25, s. 5; October 1780, ch. 23; 1785, ch. 80, s. 13; 1789, ch. 26, s. 31; 1790, ch. 57, ch. 59, s. 4. These acts, and the practice under them, prove that judgments have been entered for tobacco. The act of 1812, ch. 135, s. 3, appli-

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ed exclusively to money debts, and to make dollars and cents the current money of the state. The act of November 1781, *ch.* 16, was similar to the act of 1812, and it never was contended that it interfered with tobacco contracts, since judgments for tobacco were constantly entered on tobacco contracts, after the act of 1781, and have been so entered since the act of 1812.

Magruder, for the Appellees, relied on the act of 1812, *ch.* 135, s. 3.

JUDGMENT AFFIRMED.

JUNE.

E. & H. HURN'S LESSEE vs. SOPER

The exemplification of the enrolment of a deed of bargain and sale of a recent date, is competent evidence of title to lands in ejectment, without producing the original. A person claiming under the grantor of such a deed, but claiming against the deed, is not precluded from showing that it was obtained by fraud.

Copies of deeds that are not required to be enrolled, are not evidence.

Parol evidence of declarations by a grantor, made after the date of the deed, of her intention to dispose of the same land by will, and that she had made a will, written by the grantee, which she afterwards destroyed, offered, for the purpose of showing that she was ignorant of the contents of the deed, and that it was obtained by fraud and imposition, is inadmissible.

As no foundation could be laid by such declarations for letting in parol evidence offered to prove the contents of the supposed will, it is necessarily inadmissible.

Parol evidence is inadmissible to prove that a deed was not given for a money consideration, and therefore

ERROR to *Anne Arundel* county court. This was an action of ejectment to recover part of a tract of land called *Smith's Desire*, containing 135 acres. The general issue was pleaded.

1. At the trial the plaintiff offered in evidence the patent of *Smith's Desire*, granted to *Edward Smith* on the 1st of August 1686, and proved, that *Richard Fish* was in possession of the land, for which this action is brought, for twenty years, and died seized thereof, and that on his death he left a widow, *Sarah Fish*, a mother, *Harriet Tucker*, and a sister of the half blood, *Harriet Gambrill*, (the lessor of the plaintiff,) the daughter of said *Harriet Tucker*; and that said *Richard Fish* had, at the time of his death, no child or descendant, or ancestor, alive, but left a widow, a mother and a half sister, the plaintiff's lessor, the child of *Fish's* mother by a second husband, *Gambrill*. The defendant then offered in evidence the record of a deed from *Zachariah Tucker*, and the said *Harriet* his wife, to the defendant, for the lands for which this action is brought, dated the 7th of November 1814, and expressed to be in consideration of the sum of \$1000. The plaintiff then proved, that the said *Zachariah Tucker*, and *Harriet Tucker*, were illiterate persons, who could neither read nor write, and prayed the opinion of the court, and their instruction to the jury, that the said record of said deed could not be read to the jury for the purpose of deriving title under it, unless it was proved that the deed had been read to the grantors before it was signed by them. The court,

inoperative as a deed of bargain and sale, where the deed sets out a money consideration.

[*Chase*, Ch. J. *Ridgely* and *Kilgour*, A. J.] refused to give this instruction, but were of opinion, that the opposite party was not precluded from showing that the deed was obtained by fraud, and that the grantors, or either of them, were unlettered, and that the deed was never read to the grantors, or either of them, before its execution. The plaintiff excepted.

2. The plaintiff then offered evidence to the jury, that after the execution of the deed by *Tucker* and wife, to the defendant, *Tucker* and wife, the grantors, continued in possession of a considerable portion of the land conveyed, including the dwelling-house, that they cut wood for sale, and made repairs to the dwelling-house at their own expense, and that they continued to reside on the premises until the death of Mr. *Tucker*, without any demand or payment of rent. And, for the purpose of showing fraud and imposition on the grantor, Mrs. *Tucker*, in the execution of the deed, and her ignorance of its contents, the plaintiff offered to prove by a competent witness, that she had, after the date of the deed, declared her intention to dispose of the lands by will, and that she had made a will which was written for her by the defendant, and that said will was afterwards destroyed by her; and offered to prove the contents of said will. To this testimony the defendant objected; and the court sustained the objection. The plaintiff excepted.

3. The plaintiff, to prove that the deed from *Zachariah* and *Harriet Tucker* to the defendant, of the 7th of November 1814, was fraudulently obtained, proved to the jury, by competent testimony, that *Richard Fish* died in possession of a tract of land containing about 300 acres, and consisting of part of a tract called *Smith's Desire*, and part of a tract called *Westal's Resurvey*, and containing the quantity of 150 acres, or thereabouts, in each of said parts; that the said land descended to *Harriet Tucker* as the heir at law of *Richard Fish*, subject to the dower of the widow of said *Fish*, and that the same was of the value of ten dollars per acre, or thereabouts; that the said *Harriet* and *Zachariah Tucker* were illiterate persons, and unable to read or write; that the said *Harriet* was then of the age of fifty-eight years, had no other property, real or personal, except one or two young negroes, and some household goods; and that *Zachariah Tucker*, her husband, was a

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poor man, who laboured for his living on rented land; that 100 acres, part of said land, were assigned for dower to the widow of *Richard Fish*, then of the age of twenty-four years, and that the remaining part of said land, after deducting the part contained in the deed to the defendant, consisted of about fifty acres of very indifferent quality, with little wood on it, and without improvements of any kind, and that the part conveyed to the defendant had a comfortable dwelling-house, and other improvements on it. The plaintiff also proved, that at the time of the execution of the deed to the defendant, *Harriet Tucker* had an only daughter, *Harriet*, one of the lessors of the plaintiff, aged at the time about fourteen years, and no other relative. The plaintiff also gave in evidence, by *Charles Stewart*, a competent witness, one of the subscribing witnesses to said deed, and one of the magistrates who took the acknowledgment of the same, that nothing was said by the parties of the payment of money as the consideration for the same, but that it was said by *Harriet Tucker*, the grantor, in presence of the defendant, and not objected to by him, that she thought it best to let him have a part of the land to interest him in defending the rest, and that nothing was said of money as a consideration. The plaintiff also proved by *Blanche Hura*, a competent witness, that in a conversation which took place, subsequent to the execution of said deed, and after the death of *Harriet Tucker*, between the defendant and *Harriet*, the lessor of the plaintiff, the defendant claimed the land as his own, and said he had had a great deal of trouble about it; to which she said he had been well paid for it, and the defendant replied "yes, he had been well paid for it;" and witness understood that said deed was made on account of service rendered by the defendant. The plaintiff also proved, that a part of the said tract called *Smith's Desire*, held by the same title with the lands contained in the deed of the 7th of November 1814, had been sold and conveyed by *Richard Fish*, in his life-time, to the defendant, and was then held by him; and also proved by a witness, who lived with *Tucker* and wife from 1817 to 1819, that after the execution of said deed the grantors remained in possession of a large part of the lands contained therein, including the dwelling-house, until the death of *Harriet Tucker* in 1819, and that he never heard of any demand or agree-

ment for payment of rent for the same; and that they made repairs by covering about two thirds of the roof and shed at their own expense, and also cut four or five cords of wood for sale, and sold the same, and that the defendant lived during the whole time within two miles of the place. The plaintiff then prayed the opinion of the court, and their instruction to the jury, that if they should believe that the consideration of the said deed was not for money paid, or agreed to be paid, but for service to be rendered by the defendant in maintaining the title to the land descended from *Richard Fish*, that the said deed is inoperative as a deed of bargain and sale. Which instruction the court refused to give. The plaintiff excepted; and the verdict and judgment being against him, he brought the present writ of error.

The cause was argued before BUCHANAN, Ch. J. EARLE, and MARTIN, J.

Ridout and *Mayer*, for the plaintiff in error, contended,
 1. That the record of the deed from *Tucker* and wife to the defendant, was not properly admitted as evidence of the deed; but that the deed itself, unless shown to have been lost, should have been produced. 2. That upon the evidence adduced to impeach the deed, and under the circumstances of this case, it was incumbent on the defendant to prove the consideration for the conveyance of the land; and that that consideration must be money, or some specific equivalent for it. 3. That Mrs. *Tucker* should have been proved to have been made acquainted, by the magistrates who took the acknowledgment, with the contents of the deed. 4. That Mrs. *Tucker's* declarations and acts, after the execution of the deed, illustrating her impression as to it, ought to have been admitted in evidence. 5. That in the absence of proof of consideration in this case, and in the facts proved, there is evidence of fraud sufficient to avoid the deed. That fraud is a question of law upon the facts when ascertained.

On the *first point*, they contended, that when a copy from the record, of an instrument of writing, is evidence, it is made such by the act of assembly requiring the original to be recorded, as in the acts of 1716, *ch.* 1; 1742, *ch.* 10; 1789, *ch.* 26; 1796, *ch.* 67, *s.* 30; 1798, *ch.* 101, *sub ch.* 2, 3; and a variety of other acts of assembly.

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But that the acts requiring the enrolment of conveyances, do not say that a copy of the enrolment shall be evidence. That as a general principle, by the *English* law, the original must be produced. They referred to *Coke Litt.* 225, b. 3 *Blk. Com.* 367. *Peake's Evid.* 96. *Molton vs. Harris*, 2 *Esp. Rep.* 549. *Fraser vs. Hopkins*, 2 *Taunt.* 5. *Tinkler vs. Walpole*, 14 *East*, 226.

On the *second point*, they referred to 2 *Blk. Com.* 338. *Edgar's Lessee vs. Robinson*, 4 *Dall. Rep.* 132, 152, 340.

On the *fourth* to *Aveson vs. Kinnaird, et al.* 6 *East*, 188, 198; and *Bright vs. Eynon*, 1 *Burr.* 390.

Magruder, and *T. B. Dorsey*, (Attorney-General,) contended, on the *first point*, that a copy of a deed regularly enrolled is *prima facie* evidence, to be rebutted by the proof of fraud. They referred to *Phill. Evid.* 202. On the *fourth point*, they referred to *Dorsey vs. Dorsey*, in this court in 1813, where it was held that the declarations of the grantor, after he had made the conveyance, were not evidence.

On the other points they were stopped by the court.

BUCHANAN, Ch. J. delivered the opinion of the court. This case comes before us on three bills of exceptions. The *first* presents the question, whether the enrolment of a deed of bargain and sale, is competent evidence of title to lands in the trial of an action of ejectment, or whether the original must be produced? The court before whom the cause was tried, decided that it was, and that the original need not be produced; and it is certainly too late at this day, to question the correctness of that decision. Copies of deeds that are not required to be enrolled, cannot be admitted in evidence; but deeds of bargain and sale are, by the laws of the state, required to be enrolled; and by the uniform tenor of the decisions of the courts of the state, exemplifications of records of deeds of bargain and sale, are as good and competent evidence as the originals themselves.

In admitting in evidence the enrolment of the deed for the premises in question, the court also decided, that the plaintiff in error, who claims under *Harriet Tucker*, one of the grantors, was not precluded from showing that it was obtained by fraud; which led to the *second* and *third* bills of exceptions, in both of which we concur in opinion

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with the court below. Parol evidence of declarations by *Harriet Tucker*, made after the date of the deed, of her intention to dispose of the same land by will, and that she had made a will, written by the defendant, the grantee, which she afterwards destroyed, offered for the purpose of showing that she was ignorant of the contents of the deed, and that it was obtained by fraud and imposition, was clearly inadmissible, and properly rejected by the court. If such testimony could be received, it would lead to the most pernicious consequences, and would be to overturn the best established principles of evidence; it would be to make every man a witness for himself in his own case; for if one claiming as heir at law to a grantor, (which is the predicament of *Harriet Hurn* in this case,) could be permitted to resort to such testimony, to defeat the title of the grantee, why might not the grantor himself, under whom the heir at law comes in? And the same principle would equally apply to all cases. What security would a deed furnish to a grantee, or of what avail would be the solemnity of recording a deed, if the subsequent declarations of the grantor, that he intended to dispose of the same land by will, (which declarations might be falsely made for the purpose of begetting the impression that he was ignorant of the contents,) could be received to impeach the deed on the ground of fraud? Besides, *Harriet Tucker* was the wife of *Zachariah Tucker*, the other grantor in the deed; and who would purchase land of a husband, holding in right of his wife, if the wife's subsequent declarations could be admitted in evidence to defeat the deed? With respect to the parol evidence that was offered, to prove the contents of the supposed will, as no foundation could be laid, by the declarations of *Harriet Tucker*, for letting in such testimony, it was necessarily rejected.

If a subsequent will of *Harriet Tucker*, making a disposition of the same land, and written by *Soper* himself, the grantee, had actually been produced at the trial, instead of her declarations, it might have had an effect upon the cause; but as no such will was produced, we forbear to say any thing on the subject. The whole of the evidence set out in the *third* bill of exceptions, was expressly offered for the purpose of showing, that the deed from *Zachariah* and *Harriet Tucker* to *Soper*, the defendant, was fraudulently obtained, and was all suffered to go to

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the jury, as the proper tribunal to determine the question of fact.

The application to the court, therefore, on the part of the plaintiff, to instruct the jury, that if they should believe the deed was not given for a money consideration, it was inoperative as a deed of bargain and sale, was an attempt to obtain the opinion of the court, on an abstract proposition, not founded upon any legal evidence in the cause directed to that point; but immediately, in the teeth of the deed, which sets out a money consideration, and which, parol evidence, if directly offered for the purpose of showing a different consideration, could not properly have been received to contradict.

JUDGMENT AFFIRMED.

JUNE.

KIERSTED vs. ROGERS & GARLAND.

A judgment by default in an action of *assumpsit* on a promissory note, is an admission of the cause of action, and the defendant's liability to the amount of the note, which must be produced on the trial that it may be seen whether any part of it has been paid, but which need not be proved.

An endorsement in blank of a promissory note does not transfer the interest in the note, without some further act done by the holder. The act of filing it up may be done by him at any time, before or at the time of the trial.

If the holder of a promissory note fills up the blank endorsement, and makes it payable to himself, he must sue as endorsee, but if it is not filled up he may sue in the name of the endorser.

Where an order, in nature of a writ of inquiry at bar, under the act of 1794, *ch.* 46, charges the jury to inquire of the damages,

omitting *and costs*, and the inquisition of the jury is for damages, and about ten dollars for costs—these are mere formal defects, which might have been amended by the inferior court, and may be amended in the appellate court under the act of 1809, *ch.* 153, *s.* 2.

APPEAL from Baltimore county court. *Assumpsit* on a promissory note, dated the 1st of April 1819, drawn by B. Arnold, for \$617 09, payable six months after date to the defendant, (the appellant,) or order, and by him endorsed to J. Snyder, who endorsed it to the plaintiffs, (the appellees,) and it was by them endorsed in blank. The defendant being ruled to plead to the declaration, made default. The record then states, "for which the plaintiffs ought to recover against the defendant their damages by occasion of the nonperformance of the promises and undertakings; but because it is unknown to the court here, what damages the plaintiffs have sustained by reason of the premises, therefore let a jury thereupon appear before the court here on the fourth Monday of March next, by whom, &c. to recognize, &c. and diligently to inquire what damages the plaintiffs have sustained by reason of the premises aforesaid," and the cause is continued, &c. At the next term the parties appeared, "and the jurors of that jury, whereof mention is above made, being ballotted, empannelled and accepted, that is to say," &c. "who being called, come, and being elected, sworn and affirmed, and charged to inquire of the damages sustained by the plain-

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tiffs in the premises, and after evidence being given to them of and upon the said premises, went from the bar of the court here to consult and consider of their inquest of and upon the premises aforesaid; and the said jury, having consulted and agreed among themselves, return to the bar of the court here, and forthwith return their inquisition, under their hands and seals, to the court here, the tenor whereof is in form following, to wit: This inquisition made, indented and taken at bar, in *Baltimore* county court, in an action of trespass on the case, depending in the said court between *Elisha Rogers* and *Nathaniel Garland*, plaintiffs, and *Luke Kiersted*, defendant, witnesseth, that we, the jurors whose names are hereto subscribed, and seals affixed, being duly empannelled, sworn, and charged to inquire of the damages and costs sustained by the said plaintiffs in the said action, by reason of the nonperformance of the assumption and promise in the declaration in the said case mentioned, having heard the evidence given in the said action, and duly considered the same, do find and assess the damages sustained by the said plaintiffs, in the said action, to the sum of seven hundred and sixteen dollars forty-one cents, current money, and the sum of about ten dollars, like money, costs of the said suit. In witness," &c. Judgment was rendered for \$1250 current money, the damages in the declaration, and \$29. 01 costs of suit.

At the trial, and before the jury retired from the bar, the plaintiffs offered in evidence the promissory note mentioned in the declaration, and a protest thereof for non-payment, made at the request of *The Franklin Bank of Baltimore*, the holders of the original note, (which appeared to have been endorsed in blank by the plaintiffs,) on the 4th of October 1819, by *Thomas Rogers*, a notary public. But did not prove the hand-writing of either drawer or endorser. They also gave in evidence, that the following words, written on the back of the protest, viz. "Protest, Oct. 4th, 1819. Notice of *Luke Kiersted*, directed to him, *Fell's Point, Baltimore*, put into the post office. Do. for *John Snyder*, left at his store. Do. given to *Rogers & Garland*, evening of protest, by *D. Rogers*," were the proper hand-writing of *Daniel Rogers*, who is now dead. The defendant on this evidence prayed the court to direct the jury, that the plaintiffs were only entitled to

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nominal damages. Which direction the court, [*Hanson* and *Ward*, A. J.] refused to give. The defendant excepted, and appealed to this court.

The cause was argued before BUCHANAN, Ch. J. EARLE, and MARTIN, J.

Glenn and *Speed*, for the Appellant, contended, 1. There was not legal proof of the cause of action against the defendant. The hands-writing of the maker and endorser of the note ought to have been proved. *Peake's Evid.* 244, 245. *Esp. Dig.* 169. *Snowden vs. Thomas*, 2 *W. Blk. Rep.* 748.

2. The inquisition of the jury was void for uncertainty, and no judgment could be rendered thereon. 6 *Jacob's L. D. tit. Verdict*, 343, 344. *Mahoney vs. Ashton*, 4 *Harr. & M'Hen.* 214, per *Chase, J.*

3. The judgment was erroneous, it being for a different sum from that found by the jury. 6 *Jacob's L. D. tit. Verdict*, 344. *Coy vs. Hymas*, 2 *Stra.* 1171.

4. The order for the writ of inquiry was erroneous, there being no entry that it was made on motion of the plaintiffs, or of their attorney, nor that the jury were to inquire of the damages and costs. 1794, *ch.* 46. *Harris vs. Jaffray*, in this court, where the point was raised, and the counsel for the appellee considering it a valid objection, obtained a writ of diminution in order to have the record amended.

5. The plaintiffs had parted with their interest in the note upon which the action was brought. They had endorsed it, and it was protested at the request of *The Franklin Bank of Baltimore*, who were stated to be the holders. *Chitty's Plead.* 148, 378. *Welch vs. Lindo*, 7 *Cranch*, 159. *Mendez vs. Garreroon*, 1 *Ld. Raym.* 742.

6. There was not sufficient notice given to the endorser.

R. Johnson, for the Appellees. The judgment being by default, it was not necessary, on executing the writ of inquiry, to prove the hands-writing of the maker and endorsers of the note. *Anonymous*, 3 *Wils.* 155. The practice is now for the court, without the intervention of a jury, to assess the damages on a judgment by default in an action on a promissory note. *De Gaillon vs. L'Aigle*, 1 *Bos. & Full.* 368. *Rashleigh vs. Salmon*, 1 *H. Blk.* 252. A judg-

ment by default admits the cause of action. 3 *Blk. Com.* 397. *Green vs. Hearne*, 3 *T. R.* 301. There is nothing, therefore, in any of the objections founded on the proof of the cause of the action. The endorsement of the note in blank by the plaintiffs, shows that the suit must be brought in their names, even if the note had been transferred to the bank. *Gray & Biddle vs. Woods*, in this court, at December term 1808. *Ringgold vs. Tyson*, *Ibid* December term 1810. *Hudson vs. Goodwin*, 5 *Harr. & Johns.* 115. The question then is, is there any error in the order for the writ of inquiry. the inquisition and the judgment thereon? Here no inquiry was necessary, as the court might have assessed the damages, and entered the judgment. But having a jury, all may be considered as surplusage respecting the order for an inquiry and the inquisition. The form, however, as used, is substantially correct; 2 *Harr. Ent.* 88, 121; and if erroneous, may be amended under the act of assembly of 1809, *ch.* 153, *s.* 2. If the jury omit to find costs, the court may make such entry as is usual to authorise the allowance of costs. *Bale vs. Hodgetts*, 1 *Bing.* 182, (8 *Serg. & Low.* 288.) It is too late now to take advantage of the uncertainty as to the costs, or any defect in the judgment.

EARLE, J. delivered the opinion of the court. We fully concur in the opinion pronounced by *Baltimore* county court in the bill of exceptions in this record. They refused, on the prayer of the defendant, to direct the jury, that the plaintiffs were only entitled to nominal damages, and in this they were undeniably right. The judgment by default is an admission of the cause of action, and the defendant's liability to the amount of the note, which must be produced on the trial, that it may be seen whether any part of it has been paid, but which need not be proved. This admitted liability to the plaintiffs' action might also be considered an answer to the appellant's objection to the affirmance of the judgment, that the plaintiffs endorsed away the note by a blank endorsement, and are therefore not entitled to a recovery. But this answer need not be here insisted on, inasmuch as it has been several times adjudged in this court, that an endorsement in blank does not transfer the interest in the note or bill, without some further act done by the holder. The act of filling it up may be done by him at

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any time, even at the time of the trial. If the holder fills up the blank endorsement, and makes it payable to himself, he must sue as endorsee; but if it is not filled up, he may sue in the name of the endorser. See *Chitty on Bills*, 149, and the cases there cited; and see also *Gray and Biddle vs. Wood*, in this court. The plaintiffs endorsed to *The Franklin Bank of Baltimore*, as it is said, for collection, but the note was not transferred, let the motive have been what it might. It was in blank, and transferred no interest, and being subsequently in their hands, it was in their power to do with it as they pleased—to fill up the endorsement, or to erase it, or to make any other disposition whatsoever of it in their volition. There is then no error in this part of the case.

The two objections made on the argument to the record, we will now proceed to consider. It was objected, that the order in nature of a writ of inquiry does not charge the jury to inquire of the damages *and costs* sustained by the plaintiffs in the action; and that the inquisition found is uncertain and erroneous, in finding *about ten* dollars current money, for the plaintiffs' costs of suit. That these are in themselves errors, all must admit; but whether they are of a character to reverse the judgment, is the question to engage the attention of the court. If they are mere formal defects, they might have been amended in the court below, and may be amended here under the act of 1809, *ch.* 153, *s.* 2. Our inquiry, then, is into the character of these defects in the record.

Costs were never given at common law *eo nomine*, yet they were in reality always considered and included in the quantum of damages, in such actions where damages were recoverable. The jury were found to be inadequate judges of the amount of costs incurred by the plaintiff, and their inadequacy led to the introduction of the statute of *Gloucester*, 6 *Edw.* I, *ch.* 1, which gave costs in all cases where the party is to recover damages. Vide *Hullock's Law of Costs*, 2. A gross sum was assessed by the juries, in their verdicts, for damages and costs, the word *damna*, in its largest sense, including costs, they being a damage to the plaintiff; but the almost universal mode after the statute, as may be seen by the old books of entries, was to assess damages to a certain amount beyond the plaintiff's costs and charges, and for his costs and charges to a cer-

tain other sum, which was usually a nominal sum. Hence the origin of the judgment for costs *de incremento*, which appears, from a recent authority, to be the accustomed entry in *Great Britain* to this day. *Bale vs. Hodgetts*, 1 *Bingham*, 182, (8 *Serg. & Low*, 288.) *Sayer's Law of Costs*, 332. As it was the office of the jury to find and assess the damages, so after the statute of *Gloucester*, it became the unquestionable province of the courts, through its officers, to tax the costs the party is at in prosecuting his action, although, according to the *British* forms, it must be *de incremento*. In statutes passed since the reign of *Edw. I*, where costs are given, the costs are of the taxation of the court; and the most diligent search will perhaps justify us in saying, that a statute since that period has not been enacted, in which the assessment of costs *eo nomine*, has been exclusively given to the jury. Was such a statute to be made, its injunctions must be obeyed, and *quo ad hoc*, it would be considered, according to its language, an actual or virtual repeal of the statute of *Gloucester*, in a case that sounded in damages. The act of 1794, *ch. 46*, is not however a statute of this description. It is not its object to give costs to a party not before entitled to costs, but it is simply intended, for the very good reasons assigned by the act, to authorise trials at bar in cases on interlocutory judgments, where writs of inquiry had been usually executed before the sheriff in the country. The trial in open court being merely substituted for a trial of the same matter in the country, it could not have entered into the views of the legislature, to give more enlarged powers to the trying jury in the one case than in the other—to innovate upon the common principle, and to empower a tribunal to assess costs as such, which for ages before had been found unequal to the purpose. Where the act directs the jury to be charged to inquire into the damages and costs, the term *costs*, it seems to us, must be understood in the sense in which it is contemplated in relation to the subject for which it professes to provide, that is, in relation to writs of inquiry, and the proceedings under them. That in these the costs to be inquired into and found, are merely nominal, will be seen by an attentive examination of *Lilly's*, and other books of entry, and by a view of the before mentioned case of *Bale vs. Hodgetts*. In that case the jury found damages only, and the court suffered the

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plaintiff to amend the inquisition, by the insertion of a *nominal sum* for costs, to entitle him to his judgment *de incremento*. The form of entry, it is proper to remark, seems to have fallen into disuse in this state. For years back it has been the practice in our superior courts to enter judgments for the damages assessed by the jury, and for the costs taxed by the court, overlooking entirely the former method of finding a nominal sum by the jury, and giving the judgments for costs as an increase of the nominal sum. This practice furnishes evidence of the disregard in our courts of the costs found by the jury, and may be considered in some measure as a key to the true meaning of the word "*costs*," as used by the act of 1794. That act has been in force for 30 years, and the forms of our courts have never corresponded with it. In that to be found in *Harris's Entries*, a book compiled with great care and diligence, after the passage of the law, the order charges the jury to inquire into the damages only. This point was not decided in the case of *Harris vs. Jaffray*. It was evaded by a writ of diminution, on the return of which the objection to the record appeared to have been removed.

Let the formal errors suggested in the record be amended, and the judgment affirmed.

JUDGMENT AFFIRMED.

JUNE.

DRURY *et al.* vs. CONNER *et al.*

Where a bill in chancery stated that M had a life estate in all the tract of land called *Oliver's Neck*, the remainder in fee being in C, and that C sold to M all his interest in the land: that the purchase money was paid by M, who retained the possession of the land until his death, and that his representatives, the complainants, afterwards retained possession; although the testimony did not establish the complainants' claim to the extent stated in the bill, yet it proved a contract between C and M for one fourth part of the tract; that the purchase money was paid by M, and the possession of the land permitted to be retained by him under the contract—*Held*, that the complainants were entitled to a conveyance of the one fourth part of the tract—that permitting the possession to be retained by M, under the circumstances of the case, was equivalent to an actual delivery, and with the payment of the purchase money, took it out of the statute of frauds.

In equity, as at law, the *allegata* and *probata* must, to a certain extent, agree. But where the question is only the extent of relief, the complainant may be permitted to recover only part of what he claims.

The answer of a defendant to a bill in chancery, in a former cause, is not legal evidence in a cause against his representatives relative to the same transactions.

The answer of a defendant, professing a want of knowledge of the facts of the bill, cannot be considered as evidence against the facts; its only legal effect is to compel the complainant to establish them by testimony.

APPEAL from the court of chancery. The case is fully stated in the decree of the Chancellor, and in the opinion delivered by this court.

KILTY, Chancellor. This suit was fully argued by the counsel on each side. Since which the proceedings have been considered. The bill, which was filed in August 1811, states that *Frederick Mills*, having a life estate in a tract of land called *Oliver's Neck*, on which he resided,

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the remainder in fee being in one *William Conner*, he *Conner* in or about the year 1790, sold the reversion or remainder in fee to the said *Mills* for £150; that the whole purchase money was paid; and that *Mills* held the possession till his death, and that it had been held since his death by his representatives. The bill further states, that part of the purchase money was paid at the time the contract was made, and a bond given for the balance of the purchase money, which bond had been since discharged.

The prayer of the bill is for a conveyance from the defendants, as the heirs of the said *Conner*.

The defendants have filed their answers, denying any knowledge of the sale alleged, and three of them, relying on the statute of frauds; and testimony has been taken under a commission issued for that purpose.

It was contended for the complainants, that the contract for sale was proved by some of the witnesses, and that the statute had no effect, the contract being in part executed by the payment. The defendant's counsel denied the proof of the contract, or any payment under it—objected to the want of dates and certainty, and contested the part execution either by payment or giving possession.

The contract set forth is very uncertain. The sale is said to have been made some time in or about the year 1790. It is not said what part of the purchase money was paid, or what was the balance for which the bond was given, or when that bond was paid. A bond of conveyance is spoken of, and its loss suggested, but as a matter of doubt or conjecture, and it is not shown how *Mills* had a life estate in the whole of the land. The uncertainty is increased by comparing the present bill with the bill filed by *Mills* himself, for an injunction in 1799, which is referred to in the proceedings, and in which the contract is stated to have been made in a different manner.

The evidence under the commission is contradictory, and part of it highly improbable and suspicious; and a decree founded on it would be contrary to the intent of the statute of frauds and perjuries, which was to prevent persons from swearing verbal agreements upon others, though they had never been made. There is not sufficient proof of a payment amounting to a part performance of the agreement, and the possession was merely a continuance of that before held by *Mills*.

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It is to be observed, that on the death of *Mills*, after the injunction on his bill filed in 1799 was dissolved, the suit abated, and it was in the power of his heirs to revive that suit founded on *Mills's* own statement of the contract, or to bring a new suit at their election. They chose the latter course, whereby the defendants are deprived of the benefit of the answer of *William Conner*, in that suit; but the bill is evidence to show the variance. The note mentioned in the bill as exhibit No. 1, and as recognising the sale, is not found among the papers. On these grounds I consider, that the court in the exercise of its discretionary power, ought not to make a decree for a conveyance, as prayed. *Decreed*, that the bill of the complainants be dismissed, with costs. They appealed to this court.

The cause was argued at the last June term before BUCHANAN, EARLE, and MARTIN, J.

Taney and *Scott*, for the Appellants, contended, that the contract of sale, made between *Mills* and *Conner*, was sufficiently established by the testimony of the witnesses, and that the payment of the purchase money was also proved. That the contract, being an executed contract, was not within the statute of frauds, and that the appellants were entitled to a reversal of the decree, and to a decree for a conveyance of the land. That the statute of frauds was not imperative in every case, and that verbal contracts for the sale of lands might be established, where the purchase money, or a part of it, had been paid. They referred to 1 *Com. on Contr.* 74, 81, 82. *Lacon vs. Martins*, 3 *Atk.* 4. *Owen vs. Davies*, 1 *Ves.* 82. *Main vs. Melbourne*, 4 *Ves.* 720. *Barlet vs. Pickersgill*, 1 *Eden* 516. *Downey vs. Hotchkiss*, 2 *Day's Rep.* 225. *Whetmore vs. White*, 2 *Caine's Cas.* 109. *Buckmaster vs. Harrop*, 7 *Ves.* 346. *Rob. on Frauds*, 153. 1 *Fonbl.* 182. *Phillips vs. Thompson*, 1 *Johns. Cha. Rep.* 149. A bill in chancery is only evidence to show there had been a bill. 1 *Phill. Evid.* 263. And this case is to be considered as if the former bill had not been filed, and was not in the record. Inadequacy of price, where there is no evidence of fraud, is not to affect the contract. *Coles vs. Trecothick*, 9 *Ves.* 246. *Mortlock vs. Buller*, 10 *Ves.* 292. *Lowther vs. Lowther*, 13 *Ves.* 103. *Sug.* 171.

Magruder and *Brewer, Jr.* for the Appellees, to show that

the contract ought not to be enforced, referred to 2 *Pow. on Contr.* 222. *Jackson vs. Caton*, 3 *Ves.* 382. *Wills vs. Stradling*, *Ibid* 712. *Cooth vs. Jackson*, 6 *Ves.* 37. 1 *Pow. on Contr.* 307. *Gunter vs. Halsey, Ambler*, 580. *Clinan vs. Cooke*, 1 *Sh. & Lef.* 41. *Jackson vs. Cartwright*, 5 *Munf.* 316. *Phillips vs. Thompson*, 1 *Johns. Chan. Rep.* 149. 1 *Newl. on Contr.* 187. If there be a gross inadequacy of price in the thing contracted to be sold, chancery will not enforce the contract. 1 *Madd. Chan.* 212. *Vaughan vs. Thomas*, 1 *Bro. Cha. Ca.* 556. The contract sworn to in the former bill was different from that alleged in the present one. *Newl. on Contr.* 162, 151, 448, 452.

They went into an examination of the testimony, and contended that there was no proof of any sale.

Curia adv. vult.

The opinion of the court was delivered at this term by MARTIN, J. The court has carefully examined the record in this case, and think the decree of the Chancellor ought to be reversed. Although the testimony does not establish the complainants' claim to the extent stated in the bill, it clearly proves a contract between *William Conner* and *Frederick Mills*, for one fourth part of *Oliver's Neck*; that the purchase money was paid by *Mills*, and the possession of the land permitted to be retained by him, under the contract.

The bill states, that *Mills* had a life estate in all the tract called *Oliver's Neck*, the remainder in fee being in *Conner*, and that *Conner* sold to *Mills* all his interest in the said land; that the purchase money was paid by *Mills*, who retained the possession of the land until his death, and since his death the same has been held by his representatives. The answers filed to this bill deny all knowledge of the sale. The respondents rely upon an answer filed by their father, *William Conner*, to a bill against him in his life-time, and the statute of frauds, and leave the complainants to their proof.

The answer of *William Conner*, the father, is not legal evidence in this cause, and therefore no reliance has been placed on it in forming our decision. The answers of the respondents to this bill, professing a want of knowledge of the transaction, cannot be considered as evidence against the contract; their only legal effect is to compel the com-

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plainants to produce testimony to establish it. Three witnesses have been offered for that purpose by the complainants, and two have been produced by the respondents. Some facts are established by this testimony, beyond contradiction. They all agree that *Mills* was in possession of this tract of land; that he held three-fourths of it for life, as tenant by the curtesy. They also prove a contract between *Conner* and *Mills* for the sale of this land, but they differ as to the *extent* of that contract. The witnesses for the complainants set up a contract for the sale of the whole tract. The respondents prove a sale of one-fourth part of it.

The evidence given on the part of the complainants is uncertain, contradictory and unsatisfactory, and as the chancellor correctly observes, a part of it highly improbable and suspicious.

But what objection can prevail against the testimony of *Mr. Weems*? He is a witness produced and relied on by the respondents themselves. No attempt has been made to impeach his character; he appears to be conversant with the whole transaction; he was called on as a *common* friend; he received his information from both parties, and his attention was particularly directed to this subject. *Mr. Weems* declares, that both *Conner* and *Mills* had informed him there was a sale of one-fourth part of this land by *Conner* to *Mills*, and that *Mills* had paid *all* the purchase money for it. This is a witness produced by the respondents, and appears to us to be conclusive *upon them*. How then could the chancellor decree that the complainants were entitled to no relief in equity? That they were not entitled to a conveyance of the *whole* tract, we concur with him in opinion; but we clearly think they were entitled to the conveyance of the one-fourth part of it. The *whole* purchase money was paid, and the possession, although not delivered at that time by the vendor, (which could not be done, the vendee being *then* in possession,) was permitted to be held and retained by *Mills*. This, under the circumstances of the case, was equivalent to an actual delivery, and with the payment of the purchase money, took it out of the statute of frauds.

It is certainly a correct principle both in equity and at law, that the *allegata* and *probata* must, to a certain extent, agree.

The party shall not be permitted either at law, or in equity, to set up in his declaration or bill, one contract, and obtain relief on another of an entire *different character*. This would be great injustice—It would take the defendant by surprise, and might deprive him of property, which he had no opportunity to defend. But where the question is only the *extent* of relief, innumerable cases may be produced, where the plaintiff may be permitted to recover only part of what he claims. In this case the respondents cannot complain of surprise or want of opportunity to defend, for our decree is founded on the testimony offered by them. If a doubt, however, could have been entertained upon this point, it is put to rest by a decision of this court, in the case of *Graham & wife against Yates & others*, (*ante* 229,) where a bill was filed upon a supposed contract for the sale of a *whole square* of *Hampstead Hill*. The chancellor decreed, that the complainants were not entitled to the *whole square* as stated in their bill, but only to a *part of it*, and decreed a conveyance of *that part*, upon the payment of the purchase money. This decree was affirmed by this court at the present term.

The counsel may prepare a decree of this court, reversing the decree of the chancellor, and decreeing a conveyance of one undivided fourth part of *Oliver's Neck*, by whatever name it may be called, to be made by the appellees to the appellants, to be held by them as tenants in common.

DECREE REVERSED.

SALISBURY vs. BLACK's Adm'r. *D. B. N.*

JUNE, (E. S.)

APPEAL from *Kent* county court. This was an action of debt, brought on the 24th of February 1816, on a writing obligatory, executed on the 25th of April 1797, by *John Black*, (since deceased,) and *James Salisbury*, (the defendant and now appellant,) to *James Black*, whose administrator *de bonis non* with the will annexed, the plaintiff below and now appellee is, reciting, that "whereas *George*

B bequeathed a legacy to J, and appointed E his executor, who paid the legacy to J, and took his bond on the 25th of April 1797, conditioned to refund the legacy, or a rateable part thereof, if a deficiency of assets should actually happen, after request should be made: and there

being a deficiency of assets, and the estate overpaid by E, he brought an action on the above bond on the 24th of February 1816, against J, who defended himself under the act of limitations. Held, that as the cause of action first accrued in 1814, when the deficiency of assets was ascertained, the statute of limitations was no bar.

It is unnecessary, in such an action, to prove a special request of J to refund

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Black, deceased, did duly make and execute his last will and testament in writing, and therein and thereby, among other legacies, did give and bequeath unto the above bound *John Black* and *James Salisbury*, the sum of £1100, viz. £600 to *John Black*, and £500 to *James Salisbury*; and therein and thereby did name and appoint the above named *James Black* his executor, who hath duly proved the same, and taken upon himself the execution thereof; and whereas the said *James Black* hath, at the request of the said *John Black* and *James Salisbury*, actually paid to them the sum of £850, in part of the above legacy of £1100, the receipt of which they do hereby acknowledge, although there may be cause to apprehend a deficiency of assets for payment of debts and other legacies, The condition, therefore, of this obligation is such, that if such deficiency shall actually and *bona fide* happen, the said *John Black* and *James Salisbury*, their executors or administrators, shall, after request in that behalf to them made, refund and pay back unto the said *James Black*, his executors or administrators, their rateable part or share of such deficiency, then," &c. A judgment was entered for the plaintiff, subject to the opinion of the court, on these facts: It is agreed, that *John Black* and *James Salisbury*, executed unto *James Black*, executor of *George Black*, the bond on which this suit is instituted, dated the 25th of April 1797. *George Black* died in March 1797, having first duly made his last will and testament, dated the 29th of December 1796, whereby, among other devises and bequests, he bequeathed to his son *John Black* £600, to be paid at the age of 21 years, and to his daughter *Anna Salisbury* £500, to be paid at the end of two years after the testator's death. Letters testamentary were granted to *James Black*, on the estate of *George Black*, on the 30th of January 1797, and *James Black* returned an inventory and list of debts, amounting together to £2191 6 10. He also returned to the register of wills of *Kent* county, certain testamentary accounts of disbursements, viz,

January 9th 1798, first account, amounting to	£105	1	3
October 3d 1798, second do.	do.	59	3 2½
April term 1800, third do.	do.	802	0 2½
October term 1800, fourth do.	do.	639	15 3½

January 2d 1801, fifth do.	do.	165 10 2
January 25 1803, sixth do.	do.	412 19 11

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£2184 9 0

James Black, the executor, died on the 1st of November 1803, and no letters of administration *de bonis non* were taken out on the estate of *George Black*. *James Black* by his will appointed *Margaret Black* his executrix, who took out letters testamentary on his estate, and returned to the register of wills of *Kent* county certain accounts of disbursements made by *James Black*, deceased, on the estate of *George Black*, viz.

February term, 1804, sixth additional account, claiming an allowance for the amount overpaid by *James Black*, as per account passed on the 25th of January 1803,

£298 14 7½

Also for cash allowed *James Black* for sundry negroes appraised in the estate of *George Black*, and replevied by the executors of *James Black*, senior,

350 0 0

Also for cash paid, and commissions allowed, &c. amounting to

474 0 6½

1122 15 2

April 2d 1814, seventh additional account charging money received by *James Black* in 1801, and crediting disbursements, leaving this sum to the credit of *George Black's* estate.

£133 0 1

£989 15 1

Margaret Black died on the 1st of September 1815, and *Frederick Wilson*, the plaintiff, was duly appointed by the orphans court administrator *de bonis non*, with the will annexed, of *James Black*, on the 24th of February 1816. The county court gave judgment for the plaintiff, and the defendant appealed to this court.

The cause was argued before BUCHANAN, Ch. J. MARTIN, STEPHEN, and ARCHER, J. by

Carmichael, for the Appellant, and by

Chambers and *Harrison*, for the Appellee.

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ARCHER, J. delivered the opinion of the court. It has been contended in this case, that the statute of limitations is a bar to a recovery in this action. This question depends upon the ascertainment of the time when the cause of action accrued. The appellants allege that it accrued at the period assigned by law for the passage of a final account in the orphans court. Such a determination would limit the terms of the contract; for the parties have fixed no limited period for the ascertainment of a deficiency of assets. There is no stipulation to that effect. But the express agreement is, that the money paid should be refunded whenever a *deficiency shall actually happen*. The authorities cited in favour of this position, referring to cases in which the party who derives a benefit from the contract stipulates to do some act, before the benefit of which he is in pursuit is recoverable, are inapplicable to this case, for the obligee had never agreed upon any definite period at which the deficiency should appear. The only evidence which the statement furnishes of this deficiency, are the accounts and proceedings of the orphans court. By an examination of these it will be found, that the goods of the testator were never fully administered until the year 1814, at which period a very considerable deficiency appears. But it has been urged, that from an examination of the dates of the several disbursements for which allowances were claimed, it appears there was a deficiency of assets at the time of the death of *James Black* in 1803. *It is manifest, from an inspection of the evidence, that at the very time the bond was executed there was an insufficiency of assets.* Yet the fact was not ascertained, nor could it be known, until the goods which had come to the executor's hands were administered. When the account of the executrix of *James Black* was exhibited in 1804, property to a considerable amount, which had been returned in the inventory, was then the subject of litigation in an action of replevin. Nor does it appear by the testimony in the cause, that this action had been terminated, until it was announced in the account of 1814. It is true that this account has not the usual indications of a final account. It is not stated to be such, and further time appears to have been demanded by the executrix for the purpose of closing the estate. Yet, to every purpose, as concerns this question, the estate may be considered as closed, and the ascertainment of the

deficiency as made; for all the property had been applied to the payment of debts, and was insufficient to discharge them. Nor could the representative of *James Black*, in any account, have lawfully claimed to intermeddle with any effects of *George Black*, if such had existed, or, as such representative, have charged herself with them. Indeed, the record furnishes us with no intimation that there were other assets than such as were administered upon. But if they had existed, they would have been alone subject to the control of an administrator *de bonis non*. As the action then first accrued, when the deficiency was ascertained in 1814, the statute of limitations is no bar to this action.

It has been contended, that a special request was necessary to be proved before the right of action existed. But no special request is necessary in a case like this, where the debt becomes due on a contingency which is to happen after the execution of the contract.

JUDGMENT AFFIRMED.

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CANNELL vs. M'CLEAN.

JUNE, (E. S.)

APPEAL from *Kent* county court. An action of debt was brought on a writing obligatory, dated the 18th of August 1818, executed by *Cannell*, (the defendant below and now appellant,) to *M'Clean*, (the plaintiff below and appellee,) reciting, that "whereas the said *Cannell* hath agreed to sell and convey to the said *M'Clean*, a certain lot of woodland containing thirty-seven acres, (which the said *Cannell* purchased of a certain *George W. Thomas*, as trustee for the sale of the real estate of *Richard S. Thomas*, deceased,) for and in consideration of the sum of two thousand two hundred and twenty dollars, current money, to the said *Cannell* in hand paid by the said *M'Clean*, the receipt whereof the said *Cannell* doth hereby acknowledge. Now the condition of this obligation is such, that if the above bound *Cannell* shall, on or before the 1st of December next, make and execute to the said *M'Clean*, and deliver to him, his heirs and assigns, a good and sufficient deed of conveyance of the said lot of woodland, and therein warrant and assure the same to him and them free from all incumbrances, and shall also permit and suffer the said *M'Clean*, his heirs and assigns, peaceably and quietly to receive and take to his and their own use, the rents and profits of the premises, and every part thereof, until such con-

A bond was executed by C to M, conditioned for the conveyance of a tract of land, on or before the 1st of December then next, in which is a recital setting out the payment by M of \$2220. to C, as the consideration for the land. No conveyance having been made, an action of debt on the bond was brought to recover damages for a breach of the condition—*Held*, that the value of the land, at the time of the breach of contract was the measure of damages, and not the amount agreed to be paid; but it is otherwise in an action upon a covenant of seisin in a deed of conveyance. In the last case the consideration money of the deed is the measure of damages.

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veyances and assurances shall be made and executed as aforesaid, without any let, suit, molestation or denial, of him the said *Cannell*, his heirs, executors or administrators, or of any other person or persons by his or their means, right, title or procurement, then," &c. The following case was stated for the court's opinion: "It is admitted that no deed has been executed by the defendant and obligor, mentioned in the bond, upon which this action is instituted. That the defendant had not a legal, but only an equitable title in the land mentioned in the said bond, and still has no other. That no deed has ever been executed or tendered by the defendant to the plaintiff for the said land, and that the plaintiff has never tendered a deed to the defendant for his execution. The county court gave judgment for the plaintiff; and on motion of the plaintiff ordered, that a proceeding, in the nature of a writ of inquiry, be had at the bar of the court at the next term thereof. At that term the plaintiff assigned the following breaches—

1. That the defendant did not, on or before the 1st of December 1818; nor at any time afterwards, make, execute, and deliver to the plaintiff, a good and sufficient deed of conveyance of the land and premises mentioned in the bond obligatory, upon which this action was instituted.
2. That the defendant did not permit and suffer the plaintiff to receive and take to his own use, the rents and profits of the premises mentioned in the said bond obligatory, from the 18th of August 1818, to the 1st of December 1818.
3. That the defendant did not permit and suffer the plaintiff to take the rents and profits of the premises mentioned in the said writing obligatory.

At the execution of the inquiry at bar, the plaintiff read in evidence the case stated, as herein before set forth. The defendant then proved by *George W. Thomas*, that the plaintiff had informed him of the purchase of the wood lot, mentioned in the bond, on which the suit was brought, and had said he had received it in exchange, or in part exchange, for land sold by him to the defendant; that the witness had no knowledge of the plaintiff's having been in possession of said lots; that it was assessed on the books of the commissioners to the defendant, until the late assessment in the spring of 1822, when the assessor charged it to the plaintiff, by the direction of the witness, who gave this direction because he thought it to be the plaintiff's land.

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The witness stated, that during the years 1818 and 1819, the plaintiff had frequently offered to sell him the land, and once advertised it for sale, with other land. The plaintiff called *Joseph N. Gordon*, by whom he proved, that at the instance of *Charles Stanley* he applied to the plaintiff to know for what price he would sell the said wood lot, and that the plaintiff said he could not sell it as he had no title. This conversation was since the suit brought. The plaintiff objected to the evidence offered of the exchange of lands between the parties, and contended that the same went to contradict the written contract between them, and moved the court to instruct the jury, that the proper measure of the damages, to be ascertained by them in the cause, is the sum of \$2,220, the purchase money, stated in the conveyance bond to have been paid by the plaintiff to the defendant, with interest thereon from the first of December 1818. But the court, [*Earle*, Ch. J. and *Purnell*, A. J.] refused to give the instruction prayed, and were of opinion, and so stated to the jury, that the sum of the purchase money paid by the plaintiff to the defendant, is the true measure of their damages in this case, with interest thereon from the time of the payment, *unless* from the evidence in the cause the jury should think the plaintiff was put into the possession by the vendor of the land sold, in which case he ought to recover his principal without the interest; and that the principal in such case ought to be the measure of their damages. The court also stated to the jury, that the contract appears from the conveyance bond to be a monied transaction between the parties, and that the defendant was estopped to say otherwise, and that the testimony of *Doct. Thomas*, in relation to an exchange of the lands between the parties, was not legal evidence, and ought not to be regarded by them as such. The defendant excepted; and the inquisition being for \$2,220 current money, damages, and the sum of one cent beyond the legal costs of suit, and judgment thereon rendered for the penalty of the bond, to be released on payment of, &c. the defendant prosecuted this appeal.

The cause was argued in this court before *BUCHANAN*, Ch. J. *MARTIN*, and *STEPHEN*, J. by

Chambers and *Gale*, for the Appellant, and by
Carmichael, for the Appellee.

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BUCHANAN, Ch. J. delivered the opinion of the court. This is an appeal from the judgment of the court of *Kent* county, in an action on a bond, with condition for the conveyance of a tract of land on or before the first day of December in the year 1818, in which there is a recital, setting out the payment by the appellee, the obligee in the bond, of two thousand two hundred and twenty dollars, to the appellant, the obligor, as the consideration for the land.

It appears by the admissions in the cause, that no deed of conveyance has ever been executed or tendered to the appellee by the appellant, for the land contracted to be conveyed, and the action was brought to recover damages for a breach of the condition of the bond.

At the trial below, the court was of opinion, and among other things so instructed the jury, "that the amount of the purchase money paid by the obligee to the obligor, was the proper measure of damages, with interest from the time of payment, unless possession was delivered to the obligee, in which case no interest ought to be allowed." And the only question necessary to be decided here, is whether that court did right in so instructing the jury.

In an action upon a covenant of seizin, in a deed of conveyance of land, the amount of consideration paid, with interest, furnishes the correct rule of damages, and not the value at the time of the eviction.

The recovery is restricted to the value of the land at the time of making the contract, because the covenant of seizin is broken, if the grantor has no title, the moment the deed is delivered, and not by the eviction, which is the consequence of the want of title in the grantor. The land, as it existed, and was worth when the covenant was entered into, is to be considered as alone the subject matter of the contract, and not the appreciated or diminished value of it, by causes not existing or not contemplated by the parties at the time; and the price then agreed upon and paid, furnishes a safe guide to the value of the land, at the time of the contract of sale, and forms, with the interest, a fair measure of damages, as conducive to justice, as any other, and less liable to objection, because it is a certain rule, which places the extent of the liability on the one hand, and of indemnity on the other, before the respective parties to the contract, and guards them against the ruinous consequences of unforeseen changes in the value of the property; and if this had been an action on a covenant of seizin, the direction given to the jury would

have been sustained by this court. But a covenant to convey land on a subsequent day is of a different character.

In such case the contract is to convey the land, not such as it is at the time of entering into the covenant, but such as it may be, whether of increased or diminished value, at the time stipulated for the conveyance; and in a suit instituted on such a covenant, the question of damages is governed by the general rule, that in an action for the non-delivery of specific property on a given day, the measure of damages is the price or value of the thing on the day it ought to have been delivered, and when the covenant was broken; which, as a general principle, is as applicable to contracts respecting real as personal property.

In either case the purchaser is entitled to the thing contracted for, at the price agreed upon, and consequently to the benefit of any increased value; which would be lost to him if the damages were restricted to the price or value at the time of making the contract.

Such a rule would work great injustice to purchasers, by enabling the sellers, whenever the subject of contract should become of increased value, to discharge themselves from their contracts, by returning the consideration, and turning the enhanced value to their own benefit; and on the other hand, to comply with their contracts in case of a deterioration in value, and throw the whole loss upon the purchasers, and would be a strong inducement to fraud. Whereas the rule, that the value at the time of the breach of contract, (whether increased or diminished,) shall be the measure of damages, can in general be productive of injury to neither party. If there should be an increase in value, the purchaser, being entitled to the thing itself, there is no injury or hardship imposed upon the vendor, (if he will withhold it in violation of his contract,) in compelling him to pay the value of it, and not permitting him to discharge himself from his engagement, by returning only the consideration paid, and pocketing the difference himself against right; and on the contrary, if there be a diminution in value, no injury is done to the purchaser, in not permitting him to recover more than such diminished value; since if the contract had been fulfilled, he would have had the property subject to that deterioration, and the restricting his recovery to the diminished value, places him only in the predicament in which he would have stood if the contract had not been broken. But if he should be suffered to re-

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sort to the amount of the consideration as the measure of damages, it would work a hardship upon the defendant, the subject of whose engagement was the land or thing only, such as it might be at the time stipulated for conveyance or delivery, without regard to what should be the then value, which did not at all enter into the contract. The safest rule therefore, and one which is best calculated to promote justice, is that the value at the time of the breach of contract shall be the measure of damages.

In this case the action was brought *on a bond* with condition to convey land at a subsequent day, and not for damages on ordinary *covenant* to convey; but the principle governing one case is equally applicable to the other.

It does not appear that any improvements have been made on the land since the contract was entered into, or that any artificial value has been given to it; the general rule, therefore, here laid down, is peculiarly applicable to this case, and we think that the court below erred in restricting the damages, by the direction given to the jury, to the amount of the price paid.

JUDGMENT REVERSED.

JUNE.

THOMPSON vs. M'KIM, et. al.

An appeal does not lie from a mere practical order of the court of chancery, which is only preparatory to a final hearing, and by which the rights of the parties are not affected.

A decretal order, passed upon the issue in the cause in relation to the subject matter in controversy, and which settles the right between the parties, may be appealed from.

Whether an appeal lies in any particular case, is a question to be decided by the appellate court alone. Where the bill states that the defendant received the money in dispute for the use of the complainants, from the debtor of the complainants, under a contract between said debtor and the defendant, and the defendant in his answer, admits the contract, but denies that the construction of it is, that he was to hold the amount received under it for the complainants, but asserts that it was so received for his own use, and the chancellor decides that issue against the defendant, and passes an order directing him to bring the money into court, he may appeal from that order.

A writ of error is mandatory, and leaves nothing to the discretion of the subordinate tribunal.

Appeals in this state are on the same footing with writs of error, and are equally mandatory upon the court from whose judgments or decrees they are taken.

Under the act of 1713, ch. 4, parties are entitled to an appeal as a matter of right. Under that act an appeal is properly before the appellate court, where it has been demanded in the way provided for by such act, and a transcript of the record of the proceedings of the inferior court, under the seal of the clerk of such court, is filed in the appellate court. The provisions of the act of 1713, ch. 4, so far as relates to the manner of prosecuting appeals, have been extended to appeals from chancery by the act of 1729, ch. 3.

Appeals from the court of chancery in England, to the House of Lords, are had without consulting the chancellor. The 2d sect. of the act of 1713, ch. 4, does not apply to appeals from chancery.

The court of chancery of this state is governed by the principles of the English court of chancery, so far as the same are applicable.

An appeal from the court of chancery in this state does not, *per se*, suspend proceedings on the decree appealed from.

Pending such an appeal the chancellor, if applied to for that purpose, may order the proceedings to be suspended on such terms as the peculiar circumstances of the case may be found to require, or a special order to the same effect may be passed by the appellate court.

The power of suspending the proceedings in chancery in England, pending an appeal, by the House of Lords is not an arbitrarily assumed power, but incidental to that body as an appellate tribunal. The same power, in regard to decrees in chancery in this state, pending an appeal to the court of appeals, is incidental to that court.

The existence of such a power is necessary for the beneficial exercise of appellate jurisdiction.

Where it appears, that if the order or decree appealed from should be reversed by the court of appeals, the enforcement of such order or decree, pending the appeal, would produce irreparable injury to the appellant, an order to suspend proceedings will be passed by that court, on such terms as will not be prejudicial to the appellees.

Under the particular circumstances of this case such an order passed.

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the appellant and *John Bell*, in the court of chancery, on the 22d of September 1812, was, among other things, to recover from the appellant the sum of \$40,000, which the bill alleged had been deposited by one *Marcus Heyland* in the hands of the appellant, to and for the use and benefit of the appellees. The material facts stated in the bill are, that *Heyland*, in the year 1810, having purchased a large quantity of dry goods in *England*, amounting to about \$67,000, drew several bills of exchange in favour of the persons of whom the goods were purchased, on the house of *William & John Bell, & Co. of London*. The bills were regularly accepted. Before they became due, *William Bell*, one of the house of *William & John Bell, & Co.* died, in consequence of which the affairs of the house became deranged, and the aforesaid bills were not paid at maturity. At the instance of *John Bell*, (the other defendant,) and one of the firm, and residing at that time in the *United States*, *Heyland* placed in the appellant's hands about \$40,000, for the purpose of securing the payment of the said bills, or if the same should be paid by the house of *W. & J. Bell & Co.* to indemnify them for such payment, they having accepted the bills for the accommodation of *Heyland*. *W. & J. Bell & Co.* afterwards became insolvent, the bills remaining unpaid in the hands of the complainants. The deposit in the appellant's hands by *Heyland*, was made under a contract between himself and the appellant. It is unnecessary, however, to set out this contract here, as it is sufficiently stated both in the chancellor's opinion, and in the opinion of this court. There was a subsequent contract between the same parties, which also appears sufficiently in those opinions. The answer of the appellant admits these contracts, and the deposit in his hands under them, by *Heyland*. It avers also, that before and at the time of the said deposit, the house of *W. & J. Bell & Co.* were indebted to the appellant in a large amount on account of protested bills of exchange, drawn by their house in the *United States*, on the house in *London*, and endorsed by the appellant, and for other bills endorsed by them to the appellant. It also avers, that the deposit by *Heyland* was made with the sole view of securing the appellant from loss on account of his endorsement, as before stated, of the bills of *W. & J. Bell & Co.* drawn by the house here on the house in *London*. It also

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states, that the design and true construction of the second contract between *Heyland* and the appellant, which is before referred to, was that *Heyland* should only be indemnified to the amount of the difference between the said deposit, and the debt that might be due from *Heyland* to *W. & J. Bell & Co.* on account of the bills drawn by him, as already stated, on that house, and that it was not intended by this last contract to cancel the first one between the appellant and *Heyland*. The answer further states, that *W. & J. Bell & Co.* on the 8th of May 1811, had actually paid, on account of *Heyland's* bills on them, the sum of £511 4 10 st'g. That they afterwards paid a further sum on the same account, and that the holders of the bills were now engaged in collecting, from the surviving partner of the house of *W. & J. Bell & Co.* other and further sums, and that the appellant had reason to believe that they will collect a large amount. It is unnecessary to notice the answer of *John Bell*, the other defendant. At December term 1822, an application was made by the complainants for an order on the appellant to bring the amount deposited with him by *Heyland* into court, to be distributed amongst the several persons entitled. On this application the chancellor, at the same term, passed the order prayed for, unless cause to the contrary was shown on or before the 15th of the ensuing January. At March term 1823, an order was passed authorising depositions to be taken by either of the parties, before a magistrate, to be used at the hearing of the order for bringing in the money. Under this order several depositions were taken, and a variety of original letters from the appellant to *John Bell*, and from him to the appellant, were proved. This evidence sufficiently appears in the opinions of the chancellor, and of this court. At December term 1824, the appellant applied by petition for leave to amend his answer.

BLAND, Chancellor, at the same term, passed the following order: The arguments of counsel on this petition to obtain an order commanding *Hugh Thompson* to bring a certain sum of money into court, have been heard and duly weighed, and the proceedings in the cause have been attentively read and considered.

This practice of ordering money to be brought into court, is one of very late origin. Lord *Eldon* is reported to have said in 1804, "I remember, when the practice was

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introduced of making a defendant pay in money, appearing, by his answer or examination, to be in his hands." But it seems to have been attended with so many beneficial consequences, to have been so often resorted to, and so many of the cases have been reported, that the principles of the rule, by which the court is now governed, may be considered as fairly and fully developed. In the investigation of the principles applicable to this petition, or motion, as indeed in relation to every other legal inquiry, we should perpetually bear in mind, that it is the *reason* and *spirit* of cases make law; not the *letter* of particular precedents.

It is held to be a fundamental axiom, that the judgment of a court must be the conclusion of law arising from the facts presented to it. And in the application of this maxim, there is nothing peculiar in the character of the court, or in the mode of judicial proceeding, by which it can be at all affected or varied. It is a fundamental principle applicable to all courts, and from which none are allowed to depart. The judgment of a court of law is the legal result of the facts admitted by the parties, or found by the jury; and so too, the decree of a court of chancery is the result, according to principles of equity, arising from the facts found in the bill, answer, proceedings and proofs. Such is the acknowledged foundation of all final and general judgments or decrees. But interlocutory orders and decrees, affecting rights, must, so far as they go, have a similar basis; because, no court of judicature can arbitrarily make a *partial* any more than a *total* disposition of the rights of things or persons, without such a foundation. The judge can go no farther than to apply the rule to the case, or to pronounce the law upon the facts, either partially or wholly. It is of the very nature of judicial power to be so limited. It is, however, of no importance, as regards this principle, how the facts are made to appear, or in what shape they are presented to the tribunal; whether by confession; by arithmetical calculation; by necessary deduction; or by positive and direct proof. It is enough if the facts are so placed before the tribunal as to preclude all further denial of them. The court may then be called on, in cases like this, to pass an order, or, in other words, to pronounce the equity resulting from the facts. Such are the elementary principles. Let us now bring them near to the case under consideration.

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In cases of this sort it is not necessary, that the party moving for the order should show an unquestionable right to a part or to the whole of the money proposed to be called in. It is enough, that he shows an interest in the safety and final disposition of the funds. The general rule is, that the plaintiff is solely entitled to the fund, or has acquired in the whole of it such an interest, together with others, as entitles him in his own behalf, and the behalf of those others, to have the fund secured in court.

A motion, by a party interested, to order money to be brought into court, can only be predicated upon the allegation, that the clear conclusion of law from the facts is, that the person proposed to be called on has no right or title whatever to hold the money of which he has the possession; and, therefore, the first inquiry is, are there any facts then to be found in the cause warranting such a conclusion? And next, if there are, can the party be allowed at any future stage of the proceedings, to contradict or explain them away? It is not necessary to show, that the person called on is a mere naked trustee, without any legal control over the fund; it is sufficient, if it appears that he has no equitable right or title to the money he is called upon to produce. As, where an executor admitted a balance in his hands, but alleged that an action at law was then depending against him, and insisted, that the fund should not be taken out of his hands while he so remained liable to be called on—But the court ordered in the whole balance; and, on a recovery being had, the money was ordered to be paid the plaintiff in the action, and not to the executor.

It is said in the books, that orders of this kind were originally confined to cases where the facts were expressly admitted in the defendant's answer. It is easy to imagine, that their propriety was originally suggested by cases of that obvious and unequivocal character; but the court, having been made acquainted with their beneficial consequences, soon perceived the principle on which they were based; and in a short time threw aside the anomalous and technical notions about the necessity of finding the facts expressly admitted in the answer.

In the case of *Freeman and Fairlie*, which was so cogently pressed upon the attention of the court by both parties, Lord Eldon says, "I think it right to say, that under all circumstances, I can take the personal estate to have been in 1791, £2000, and that I may add the accu-

mulations to 1812; but *I have not in this answer any distinct admission* that he has laid out the money in East India securities, in such a way as to enable me to ascertain and order him to bring in what is the fair amount of the personal estate." And in conclusion, the chancellor ordered the defendant to bring in the sum of £3680; whence it is clear, that he felt himself at liberty to go as far with his order, or in pronouncing the conclusion of law from the facts in the case, as those facts were then, and in that stage of the case established, and open to no contradiction or explanation in the course of the subsequent proceedings. For, although the chancellor took much pains to show that the defendant had; by his own answer, covered himself with shame, yet the order went no further than the incontrovertible facts in the case would fairly warrant, or, as the chancellor says, "under all circumstances." Hence, if the statements, allegations, and then situation of the cause, in relation to the motion, are of such a nature as to leave the matter open to be affected by the proofs to be adduced at the final hearing, the court cannot pass any interlocutory order or decree whatever on the subject.

But in this case of *Freeman and Fairlie*, the facts appear to have been deduced, under all circumstances, from the answer itself. The first step taken to find facts beyond, but in the immediate precincts of the answer was, when a schedule was referred to in the answer as containing a correct statement; the items of which schedule, if added up, would show the sum admitted to be due. Such a form of admission was, therefore, held to establish the facts as unequivocally as if the sum had been distinctly specified in the answer itself. This position necessarily comprehended another case going apparently one step farther, but which was in fact precisely the same in principle; that is, where the party referred in his answer to, and produced, a set of books of accounts, and alleged that they contained a fair, true statement of facts—if on referring them to the auditor, he reports, that they show a certain amount to be in the defendant's hands, it will be considered as an indirect, but sufficient admission of such fact, and the court will order the money to be brought in. But if no distinct fact can be deduced from the answer itself, laying a foundation for such a motion, and the case

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is referred to the auditor, and the party, on his examination there, makes admissions of such facts, they will be considered as binding and conclusive as if made in the answer itself. So much then for the direct and indirect statements and admissions of the party himself.

There are other cases which show that the court has gone much further with the principle, and distinctly manifested a disposition to follow it out, in all its bearings. For where a controverted case of account had been referred to the auditor to adjust, and the parties had there fully contested the matter, and the report of the auditor showed a balance in the defendant's hands to which he was not entitled—in such case, after the lapse of the time allowed to except to it had expired, and after it had been confirmed, an order was granted to have the money brought into court, and this not on the ground of any admission of the party, for the truth might have been, that he contested every item and every point before the auditor, but upon the ground that the court was presented with facts in that stage of the cause which had been established in a due course of judicial proceeding, which could not thereafter be, in any manner, questioned or denied by the same party.

The objects and inducements for making an interlocutory order, or partial decision of this kind, are to remove the fund out of danger, to place it in a state of the greatest security for the benefit of all concerned; and by circumscribing the field of controversy, to accelerate the further progress of the cause, and save costs; since it is evident, the parties will spin it out while they have the advantage of keeping the money.

Hence it appears, that those who make this motion must show, that they have an *interest* in the money proposed to be called in; and that he who holds it in his possession has no equitable right or title to it whatever. And the facts, on which these positions are to be based, must be found in the cause as it now stands, either admitted or so established as to be open to no further controversy at any subsequent stage of the proceedings.

These principles being settled, the next inquiry is, how far the court may allow itself to range through this case in search of those facts, which are to be thus taken as admitted or established? The plaintiffs contend, that the an-

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swer of a co-defendant, and certain exhibits and proofs, taken in express reference to this motion, should be read and considered. On the other hand the defendant, *Thompson*, urges, that the very satisfactory explanations of what he calls his supplemental answer, or at least that matter stated in his petition, filed on the 31st of January last, as the substance of a supplemental answer, which he ought to be permitted now to file, should be taken into view. All these matters must be disposed of before we can safely undertake to bring together what may be considered as the admitted or established facts in this cause in relation to this motion.

The answer of the defendant, *John Bell*, it has been urged, may be resorted to as belonging to the *res gesta*, to the same subject, either as direct evidence, or for explanation, or illustration. It is, in general true, that the answer of one defendant cannot be used as evidence for or against another defendant. Whatever may be the extent of the exceptions to this rule, none of them embrace this case; for it is very clear, that *Thompson* has made no reference to, nor admitted any thing which *John Bell* has said in his answer; nor has the truth of any one of *John Bell's* allegations been put in issue, before the auditor or otherwise, and conclusively established against *Thompson*. The answer of *John Bell*, the co-defendant, cannot, therefore, be allowed to furnish any of those facts on which the decision of the court must be founded on this motion.

The plaintiffs have also directed the attention of the court to the exhibits and proofs taken under the order of the 10th of May last, in reference to this motion, and have contended, that, in cases like this, proofs of collateral facts and circumstances may be introduced. But the authorities relied on to sustain this position, point to an important distinction in the classification of cases of this nature. In cases between vendors and purchasers of real estate, the purchaser who is not in possession cannot be called upon to pay in the purchase money until the title is completed; nor will the mere fact of his taking possession entitle the vendor to call upon him for the payment of the purchase money into court. But if the purchaser, being in possession, exercises acts of ownership, he may be compelled to pay the purchase money into court; and the taking possession, and the acts of ownership, though not mentioned

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in the bill or answer, are the collateral facts which may be shown by affidavits, or by proofs taken in a manner similar to those offered upon the present occasion; but in such cases, that the purchase money is due, and the amount, are facts admitted and established; and whether it should be immediately brought in, or whether the purchaser should be indulged until final hearing, or how much short of that, are questions which depend upon equitable circumstances not necessarily involved in the principal controversy, that never would be brought into view, but by such a motion. They are, therefore, truly and properly collateral circumstances. But in this case the question is, whether, in the *direct* progress of a case, it has been established or admitted that a party holding money has no title to it, and is therefore liable to be called on in this way. In this class of cases, it is part of the principal matter in controversy; one of the circumstances of it; as much so as, in the other class, between vendor and purchaser, whether the purchase money was really due or not; and, being necessarily involved in the main question, the court will not stop or delay the regular progress of the cause to investigate or establish it by affidavits or proofs taken out of the regular order. The proof of possession, and acts of ownership, lay the foundation of that equity which entitles the vendor to make the call for his money sooner than he otherwise could do; and, in that class of cases, it is said to be now quite decided, that upon motions of this sort affidavits of such collateral circumstances may be read, and that it was a practice to be encouraged, as it shortened pleading. But there is an obvious distinction between such collateral circumstances and peculiar equity, and the admission or establishment of facts, which go to show the real title to the fund proposed to be called in. Therefore, the proofs and exhibits that have been taken under the order of the 10th of May last, must, upon the present occasion, be laid aside as altogether inadmissible.

Having thus disposed of the proffered auxiliaries of the plaintiffs, let us now take a review of those tendered by the defendant *Thompson*. He insists that a certain paper he has presented as a supplemental answer ought to be considered as an amended answer, or that he ought now to be permitted to file a supplemental answer as prayed by his petition.

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It is well known, that it is with great difficulty permitted to a defendant to make any alteration in his answer, even upon a mistake. And there is no instance of its having been allowed for the purpose of retracting a clear and well understood admission. It should appear due to general justice to permit the issue to be altered. The rule upon this subject is, that the defendant must move to put in a supplemental answer, and accompany the motion with an affidavit, in which he must swear, that when he put in the answer he did not know the circumstances upon which he applies, or any other circumstances upon which he ought to have stated the fact otherwise, or that when he swore to his original answer he meant to swear in the sense which he now desires to be at liberty to swear to.

The paper tendered as an amended answer comes within no part of this rule. It is silent as to the causes which occasioned him to omit mentioning the new matter, therein contained, in his original answer; nor does it, or the affidavit annexed, say any thing of his not knowing of the new circumstances therein disclosed. It, in fact, purports to be a mere additional or amended answer proposed to be put on file with the leave of the court, without any previous affidavit attempting to account for the mistakes or omissions proposed to be corrected or supplied. It must, therefore, be altogether rejected. But this defendant has now filed his petition on oath, in a formal manner, praying for leave to file a supplemental answer. This petition points out, with sufficient certainty, that which the petitioner alleges was a mistake as to the time of receiving the money first spoken of in his answer. But that part of the answer, which is thus designated as erroneous, is too indefinite and obscure to lay the foundation of such an order as this, now asked for by the present motion—It speaks of “considerable payments,” without specifying whether they were made in bills, or cash, or what was the amount of all or any of them; nor does that part of the answer make any such reference to any other document by which the uncertainty might be removed. Therefore, as regards the present motion, whether the answer is suffered to remain as it now does, or is corrected, as proposed, is of no kind of importance.

The chancellor deems it unnecessary now to decide, whether a supplemental answer should or should not be

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allowed to be filed to correct this alleged mistake in reference to the final hearing; since the subject was not distinctly argued and presented to the court with that view.

The second and third class of errors and corrections, stated and prayed for, are of the same character, and the same observations will apply to both. The defendant admits he knew, at the time he answered, that all right or claim which he could, in any manner, make to the monies received from *Heyland*, could only be derived from the deeds which had been previously made and entered into between him and *Heyland*. He does not pretend to have received any money from *Heyland* in any way except under and by virtue of those contracts; consequently, his right to hold and apply it, can only be derived from them. His answer distinctly enough states what he believed to be his rights, as well with regard to the then state of things, so far as they were known to him, as with reference to all other and future occurrences. If these contracts authorised *Thompson* to hold the fund, in any way, for his own use, the original answer, in which he has, by explicit reference, embodied those contracts, as a part of it, with suitable and apt words for that purpose, contains all that is substantially necessary for his defence, and, consequently, those after extensions of *Thompson's* liability, and subsequent ascertainment of the amount of his claim upon the bills, spoken of in his petition, are more proper and fit subjects for proof and adjustment on the final hearing, than of a supplemental answer.—A supplemental answer is only intended to correct the allegations of the original answer, or to remove from it dangerous admissions, so as to let in proof on the hearing of the real merits of the case. In this case all the merits are, on this motion at least, to be derived from the contracts; and the answer covers the whole ground over which those contracts can in any way be extended; consequently, it is in all respects co-extensive with all the real merits of the case in every shape whatever; and, therefore, the supplemental answer prayed for cannot be allowed.

While we are in the way of removing or rejecting matters entirely extraneous from the question now under consideration, it may be well to observe, that, although the letter of the 10th November from *John Bell* to *Heyland*, may be used between the *Bells* and *Thompson*, and shows the

inducement for entering into the two deeds between *Heyland* and *Thompson*; yet, as it cannot be allowed to control or contradict those deeds, it must, upon the present occasion, be entirely laid aside.

Having removed from about this motion all matters which do not properly belong to it, let us now see how the case stands in its simple and reduced form. It is this—The trustees for all the creditors of *Marcus Heyland*, appointed under the insolvent laws of this state, together with sundry of his specified creditors, now move the court to order *Hugh Thompson*, a defendant, to bring into court the sum of eight thousand eight hundred and eighty-nine pounds five shillings and four pence, sterling money of *England*, which he had received at various times between the 5th March 1811 and the 13th of September following, as specified in the exhibit E referred to in their bill. Which sum of money, they charge, was received under and by virtue of the last mentioned of the two deeds entered into between *Heyland* and *Thompson*, the one dated on the 20th of November 1810, and the other bearing date on the 8th of January 1811. To this *Thompson* answers and admits, that the persons named in the bill are the creditors of *Heyland* as stated, and that the two deeds were made and entered into as stated; but he denies that the second was intended to cancel or supersede the first; and, after making sundry allegations about the true intent, and the proper interpretation of those contracts, and his right to hold and apply the money received under them, to his own use, he then makes a direct answer to the bill as to the money which it alleges to have been received by him as stated in the exhibit E, in these words: “Defendant did receive from *Marcus Heyland* the sums of money mentioned in complainant’s bill.” And further, “That at the time the money was paid into his hands by *Heyland*, defendant did not expect it would be appropriated to the payment of *Heyland*’s creditors in *England*.”

The true construction of written contracts is a matter which belongs exclusively to the chancellor; no parol proof can be admitted to explain them, unless in cases of latent ambiguity. No such ambiguity exists in the present case. Therefore, all the facts relative to *Thompson*’s right and title to the money which he acknowledges he has received from *Heyland*, are as fully before the court now as they

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can be at any future stage of the cause, or at the final hearing. The only opening for any doubt or hesitation is, as to the true intent and meaning of those deeds. Let us then consider them carefully.

By that of the 20th of November 1810; it appears, *Heyland* had become largely indebted to sundry persons for goods purchased of them; that to secure the payment of those debts, he had drawn bills on the firm of *William & John Bell & Co.* which they had accepted—who might, therefore, if they paid those bills, become the creditors of *Heyland* in place of those of whom he bought the goods. After which the *Bells* transferred and made over this eventual and uncertain claim of theirs upon *Heyland* to *Thompson*. In consideration of which *Heyland* bound himself by this contract to pay to *Thompson* such balance as might be found to be due from him, *Heyland*, to the *Bells*, on account of these transactions, or otherwise, upon the fate of the bills being known, and a fair statement of accounts between *Heyland* and the *Bells*.

This seems to be the clear sense and substance of this first agreement. From which it appears, that *Thompson* was put into the place of the *Bells*; and, consequently, to the extent of their claim upon *Heyland*, became his creditor; and as such, had a right to the funds which were placed in his hands under that agreement. But it is doubtful, from the answer, whether *Thompson* ever received any thing or not under this first agreement exclusively; and even supposing he had, the amount not being specified, the court could make no order on this motion respecting it.

It appears however, that the sum specified in the exhibit E, and which is distinctly acknowledged to have been received, came to *Thompson's* hands after the execution of the deed of the 8th of January; and consequently, must be controled and regulated according to that contract, and not the first deed of the 20th of November. Hence it becomes necessary to proceed directly to the consideration of the second agreement dated on the 8th January 1811.

This contract, after a recital nearly word for word the same, and in sense entirely the same as the first, proceeds to declare, that in consideration of the premises *Heyland* is held bound to pay to *Thompson* such balance as might be found due from *Heyland* to the *Bells*, on account of those transactions, or otherwise, up to that time; that *Hey-*

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And will immediately proceed to account with and pay to Thompson the amount of the aforesaid acceptances, in the same manner as if it had been ascertained they had been duly paid by the Bells; that on all those payments Heyland was to be allowed the current exchange, and further, that Thompson should indemnify Heyland to the amount paid into Thompson's hands by Heyland, against all demands that might be rightfully made against him on account of those acceptances, either by the Bells, or by the holders of them.

By this deed *Heyland* does, most clearly and distinctly, give us to understand, that it was his intention to pay all those of his creditors in whose favour he had drawn bills on the *Bells*. For, with what other possible view could he have stipulated to account with *Thompson* for the whole amount of the bills, as if they had been actually paid by the *Bells*? And with what other understanding was the covenant entered into for an indemnity against all those creditors? It is most manifest, therefore, that *Heyland* placed this fund in the hands of *Thompson* for the use of that class of his, *Heyland's* creditors, the bill-holders, whoever they might be.

But it is alleged that *Thompson* has a title to at least a share of this fund as the assignee of the *Bells*; and this, it is said, is proved by the recital in this deed, in which it is acknowledged, that the *Bells* "had transferred and made over all the amount due by the said *Heyland* for the goods which said house of *William and John Bell and Company* accepted to pay on his account to *Hugh Thompson*;" and also by the express stipulation, by which *Heyland* bound himself to *Thompson* for such balance as might be found due from him, *Heyland*, to the *Bells*, on account of those transactions, or otherwise, to the time of executing that deed.

This position may perhaps be more clearly and strongly presented in another form, thus—*Heyland* stands indebted to sundry persons in the sum, suppose for example, of \$16000, for the payment of which the *Bells* are his securities, and as such, they have paid for him \$4000, and consequently stand in the place of his creditors to that amount. But this claim of the *Bells*, having been assigned by them to *Thompson*, he has thus circuitously become a creditor of *Heyland* to the amount of that \$4000, part of the original

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debt of \$16000. Now, says the defendant's counsel, *Thompson* must be allowed to return at least one fourth of the fund which has been placed in his hands for the payment of the whole \$16000, since he in fact, stands in the place of the original creditors to one fourth of that whole amount.

There is an imposing aspect of equity in this position, and if the court felt itself at liberty to make free with the positive covenants of the parties, there might be no difficulty in applying its equalizing principles to this case, but the court is not at liberty to reject or impair the covenant of indemnity in this deed of the 8th of January. By that covenant, *Thompson* is bound to save *Heyland* harmless, not merely against the *Bells*, but against all the holders of the acceptances, whoever they may be, to the amount of the funds in his hands. In other words, he is thus constituted a trustee for the bill-holders, of the funds in his hands, to the amount of the balance remaining due and unpaid on those acceptances; for, otherwise *Heyland* would not be indemnified against all demands by the bill-holders, according to the express terms of this contract. The expressions in this deed, "on account of the transactions before alluded to, or otherwise, to the time of executing these presents," were intended merely to refer to the means of ascertaining the extent of *Heyland's* liability to the bill-holders, and the amount of the funds which it was necessary should be placed in *Thompson's* hands to meet those liabilities of *Heyland's*. The great leading object of *Heyland* was to provide for the payment of his *own* debts due to those bill-holders. He had nothing to do with the transactions between *Thompson* and the *Bells*, or with the debts due from the one to the other of *them*. The obvious inducement of *Heyland*, in making this provision in favour of his bill-holders, was some apprehended inability of those who had thus become his security to them. Hence, whatever might have been the nature or design of the assignment of the claim on *Heyland* from the *Bells* to *Thompson*, or of any contract between *those* parties, that transfer, or contract, cannot be permitted to control or contradict the positive and clear stipulations contained in this deed of the 8th of January between *Heyland* and *Thompson*.

In short, the clear and unequivocal objects of this deed, were to place funds in *Thompson's* hands to meet the

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claims of those of *Heyland's* creditors, who should present themselves as the holders of his bills, as therein described; and to obtain an indemnity and discharge for *Heyland* from every part of those claims, so far as those funds would go. But *Thompson* does not pretend that he stands here as a creditor of *Heyland* in the special character of a holder of all, or any one of the specified acceptances; he is not, by any thing that is alleged or appears, a holder of any one of the designated bills drawn by *Heyland*. It might be, that *Heyland* looked to other resources to pay the *Bells* any proportion or dividends which they might pay on those acceptances; and this seems plausible. But whatever may have been the intention of the parties, as to any matters not comprehended in the deed, that contract in itself is clear and unequivocal. The fund in *Thompson's* hands was to be applied to the satisfaction of the demands of certain designated bill-holders; *Thompson* is clearly and confessedly not one of them, he has therefore no right or title whatever to the money which *Heyland* had placed in his hands, for his indemnification against them.

It is therefore, on this twelfth day of February, in the year eighteen hundred and twenty-five, Ordered and adjudged, that *Hugh Thompson* bring into this court, on or before the fourteenth day of April next, the sum of thirty-nine thousand five hundred and seven dollars and eighty-five cents, being the value of eight thousand eight hundred and eighty-nine pounds five shillings and four pence, sterling money of *England*, together with legal interest thereon from the first day of January in the year eighteen hundred and twelve, which sum, it appears by the admitted and incontrovertible facts in this cause, he had received from the said *Marcus Heyland*, previous to the fourteenth day of September in the year eighteen hundred and eleven, for the use of said *Heyland's* creditors, as specified in the proceedings in this cause; and which the said *Hugh Thompson* ought, within a reasonable time thereafter, to have paid to the said creditors; Provided a copy of this order be served on the said *Thompson* on or before the twenty-fifth day of the present month. And it is further ordered, that the said sum of money, with interest thereon, when so brought into court, shall be deposited in the *Farmers Bank of Maryland* to the credit of this cause, subject to the further order of this court.

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From this order the appellant prayed an appeal to this court, and filed an appeal bond. On the prayer for an appeal, the following order was passed:

BLAND, Chancellor, (2d of May 1825.) In this case the defendant, *Hugh Thompson*, by his counsel, on the 11th of April last, moved the court to grant an appeal from its order of the 12th of February last, and thereupon filed and offered an appeal bond for the approbation of the chancellor. The motion was permitted to lay over until the plaintiffs could be heard; after which their counsel appeared, and asked to be allowed further time to reply, in writing, to the defendant's motion, which was granted; and, on the 28th of the last month, a written argument, on the part of the plaintiffs, in opposition to the motion, was accordingly submitted to the chancellor. The parties having been thus heard, the motion has been deliberately and maturely considered.

The chancellor took some pains, after a very careful research into all the authorities within his reach, to explain the reasons and grounds on which he founded the order of the 12th of February last. The greater part of the debatable ground, occupied in the discussion of the motion for that order, was as to its foundation,—as to the kind of admissions, or state of things which would warrant its being made. The court was, therefore, explicit upon that subject. But, whether such an order was interlocutory, or final—a “decretal order” or not, was neither mentioned in argument, nor considered by the court. The investigation of the nature of the basis of such an order being a matter of much importance, was, however, made with great care; because, upon its being ascertained, whether that basis was solid and uniform, or loose and shifting, depended the very interesting question presented in that argument—whether such orders were likely to be attended with good or ill consequences; or whether they were, or were not capable of being used as instruments of oppression? And it was, on finding, that the authorities required the most broad and solid foundation, *no less clear and strong than that of a final decree itself*, that the court was perfectly convinced of their great utility in all cases where there was a proper foundation for making them, and that they were no more capable of being abused, or applied to improper purposes, than final decrees themselves.

But the foundation, or basis of an order, does not determine its effect upon the controversy or the parties. *An admitted, or incontrovertible state of facts, is required as the foundation of an order to bring money into court. As the foundation of an order to account, it must appear that a computation is necessary relative to the matter on which the court may be called on to decree; and to lay a proper foundation for an order to pay money out of court, the party claiming it must show a clear title in himself. But no inference can be deduced from the nature of the basis of an order as to its true character, that is, whether it be interlocutory or final, a decretal order, or otherwise. Such questions can only be determined by the order itself, considered in all its relations and bearings upon the parties and upon the cause.*

Whether an appeal can be allowed, as moved for, in this case, must depend altogether upon, whether the order of the 12th of February last is or is not a "decretal order," within the true intent and meaning of the act of 1818, *ch. 193, s. 1*. The *English* authorities explain, with tolerable accuracy, the difference between interlocutory and final decrees in chancery, but the phrase, "decretal order," seems to be variously applied, and to have no settled or distinct meaning or application. The term "order" is almost always used in speaking of those general or special directions by which all suits in chancery are governed, controlled, or facilitated throughout, or in the course of their progress from beginning to end; and, the term "decree" is most generally applied to the decisions of the court upon some or all of the rights of the litigating parties. Hence it would seem, that a "decretal order" can only be such an order as finally determines some right between the parties. But we have a satisfactory and conclusive authority of our own state upon this question—The court of appeals, in the case of *Snowden vs. Dorsey*, say, "that an appeal will not lie from a mere interlocutory order by which nothing is finally settled between the parties;" and "which was only preparatory to a final decree, and was liable to be reviewed at pleasure"—or, "where nothing is done conclusive upon the chancellor, but the order remains open, subject to his final disposition, and may be rescinded on motion." Let the order of the 12th of February last be tested by this decision of the court of appeals, and every difficulty must be

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at once removed; it is, upon the face of it, merely preparatory to a final decree, nothing is done conclusive upon the chancellor. The order directs, that the money, "when so brought into court, shall be deposited in the *Farmers Bank of Maryland* to the credit of this cause, subject to the further order of this court." The place of the deposit of the money is ordered to be changed. It is to be made more secure for the benefit of all concerned, subject to be disposed of by any future order, or by the final decree, in such proportions and in such manner as the right and title of the parties shall require. This order of the 12th of February last, is not then, according to this opinion of the court of appeals, a "decretal order"—And the construction, thus given by that court, to the phrase "decretal order," in the act of 1818, accords with that which has been always heretofore given to it by this court.

The practice of requiring and giving bond, on an appeal from a decree of the court of chancery, was very carefully inquired into and considered, by the chancellor, in the case of *Ringgold vs. Ringgold*; and, in the course of his investigations in that case, he became perfectly convinced, that there was no legislative enactment of this state relative to appeal bonds from the decrees of the court of chancery. The act of 1729 only declares that the provisions of the act of 1713, on the subject of appeals, so far as they relate "*to the prosecution of them,*" shall apply to chancery cases; and, so far as any thing may be inferred from what was done by the court of appeals in the case of *Smith vs. Dorsey*, at June term 1824, (for the court gave no reasons for their act,) it appears to be the opinion of that tribunal, that there is no act of assembly requiring a bond to be given on an appeal from the court of chancery. But it would be obviously impossible, or very difficult, to apply the provisions of the act of 1713, relative to *appeal bonds*, on appeals from judgments at common law, to appeals from the multiform and complex decrees of the court of chancery. It has, however, been the constant practice to require bond and security on appeals from the court of chancery, where the thing decreed would be put or continued in jeopardy, or at risk. The practice upon this subject, as heretofore settled and established, the chancellor has neither the disposition nor the power to alter in any respect whatever.

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But if an appeal would lie from such an order as that of the 12th of February last in this case, and if the chancellor could, in no case, on an appeal, as in *England*, order the money to be paid into court, to remain there pending the appeal, and if he were bound, as has been contended, by positive legislative provisions to grant the appeal, on the parties entering into bond with approved security, then it would be utterly futile to ask for or obtain such an order in any case whatever, even in the plainest and strongest that could be imagined, since the party thus called on could always suspend its execution at pleasure. The order in this case calls on the party to bring the money into court, that the court itself may have it placed in perfect safety for the benefit of all concerned; not that he shall merely give security for the payment of it. But if the party could appeal from such an order, and suspend its execution, by giving an appeal bond, then he could, in effect, prevent the court from going farther than barely demanding security for the payment of the money. The consequence of which would be, that such orders, if made, would operate partially and not alike upon every citizen; upon those most wealthy and best able to comply, they would be mere cobwebs; but upon those least able to find security they would have their full and just effect; they would operate as rigid injunctions. Upon the whole, the chancellor is perfectly satisfied that an appeal cannot be allowed, and therefore,

It is ordered, That the motion of *Hugh Thompson*, to grant an appeal from the order of this court, made on the 12th February last, directing him to bring a certain sum of money into court, as therein set forth, shall be and the same is hereby overruled, and rejected.

At the present term of this court the appellant filed the following petition, together with a duly authenticated transcript of the proceedings of the court of chancery in this case, viz.

To the Honourable the Judges of the Court of Appeals for the Western Shore.

The petition of *Hugh Thompson*, of the city of *Baltimore*, respectfully sheweth, that a certain bill of complaint was heretofore exhibited in the court of chancery against your petitioner, and a certain *John Bell*, in which said bill of complaint a certain *John M'Kim*, junior, and *Thomas*

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L. Emory, junior, &c. are named as complainants; and in which said bill of complaint it is alleged, that a large sum of money, paid by a certain *Marcus Heyland* to your petitioner, must be considered as deposited with him for the use of the above named complainants, excepting from such use the above named *M'Kim* and *Emory*; and in which said bill of complaint it is prayed that your petitioner may be compelled to pay the money, so received by him, to the said *M'Kim* and *Emory*, for the use of the other parties named as complainants in the said bill of complaint. That this petitioner hath answered the said bill of complaint, and in his said answer denied that he received the said sum of money for the use of the aforesaid complainants, or any of them; and also averred that he received the said sum of money, from the said *Heyland*, in payment of a debt due to your petitioner from a certain mercantile house trading under the firm of *William & John Bell & Co.* which said denial and averment your petitioner still insists are both true. That certain other and further proceedings were had in the said cause; and pending the said suit, and before the proofs of this defendant were taken, and before the said cause came to final hearing, the honourable the chancellor, by an interlocutory and decretal order, made on the twelfth day of February, in the year eighteen hundred and twenty-five, decided that the said sum of money, paid to your petitioner by the said *Heyland*, was paid for the use of the creditors of the said *Heyland*, and ordered the same to be brought into the court of chancery on the fourteenth day of April last. That your petitioner appealed from the said order to this honourable court, and immediately on making such appeal, filed his appeal bond, with sufficient sureties, in due form of law, and procured a transcript of the full proceedings of the court of chancery, under the hands of the register of the said court, and seal thereof, and also hath caused the same to be transmitted to this honourable court, to be here heard, tried and determined; and also, at the time of making such appeal, your petitioner, by his solicitor, directed and required of the aforesaid register to enter a memorandum of such demand of appeal, as well in his court's proceedings as in the fair records of the proceedings of the court of chancery. That the said appeal was demanded in the manner herein before set forth, and the

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said appeal bond filed in the court of chancery before the time limited for the payment of the money into court, by the said order of the honourable the chancellor. All of which will more fully and at large appear by the aforesaid transcript now remaining in this honourable court, to which your petitioner, for greater certainty, prays leave to refer. Your petitioner further states, that after the above mentioned proceedings were had, the honourable the chancellor passed another order, dated May 2d, 1825, in the following words: "It is ordered, that the motion of *Hugh Thompson* to grant an appeal from the order of this (*the chancery*) court, made on the 12th February last, directing him to bring a certain sum of money into court as herein set forth, shall be and the same is hereby overruled and rejected," as by a copy of the said order, contained in the aforesaid transcript, will among other things appear. Your petitioner also states, that as soon as he was apprised of the last mentioned order, he with all convenient speed, to wit, on May 11th, 1825, presented a petition to the honourable the chancellor, praying him to suspend all further proceedings on the aforesaid order of February 12th, until the meeting of this honourable court, and offering in the mean-time, in addition to the personal security before mentioned, to deposit in the court of chancery one hundred thousand dollars of stock of the Bank of the *United States*, now worth in the market an hundred and twenty thousand dollars; and your petitioner, upon such securities, for the ultimate safety of the money in question, besought the chancellor to suspend proceedings on the order first herein mentioned until the meeting of this honourable court, to whom your petitioner is advised it rightfully belongs to ascertain and determine the limits established by law to their jurisdiction in cases of appeal. But the honourable the chancellor rejected the prayer of the said petition, by an order passed on the 12th day of May 1825, as will appear by a copy of the said order herewith filed, marked *A*; and moreover, on the tenth day of May 1825, ordered an attachment against your petitioner, for not complying with the order of February 12, herein before mentioned, and from which said order your petitioner had appealed in the manner herein before set forth; and which said attachment issued accordingly, May 11, 1825, was made returnable before the meeting of this court, that is

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to say, forthwith, as by a copy of the said attachment herewith filed marked *B*, will appear. Forasmuch therefore as the honourable chancellor has determined to enforce the aforesaid order of February 12th, by the actual imprisonment of your petitioner, notwithstanding his appeal from the same in the manner herein before stated, and pending his said appeal, and forasmuch as the said appeal and bond, given in the manner herein before stated, operates, as your petitioner is advised, to suspend the jurisdiction of the court of chancery on the matter appealed from, pending the said appeal, by virtue of the act of assembly in such case made and provided; and forasmuch also by the general principles and established usage of the court of chancery of this state, independent of the act of assembly aforesaid, no order or decree ought to be enforced, pending an appeal from such order or decree, and forasmuch also as the principles of equity and justice do not in this case require that the said order should be enforced pending the said appeal, but on the contrary require that the same should be suspended until the final decision of the cause, for the following reasons:

1st. Because the execution of the said order will not, and cannot in any manner benefit the complainants in any event of the cause, inasmuch as the money will remain a dead and unproductive fund in the court of chancery, until the ultimate decision of the case; and inasmuch also, as the money in controversy is already abundantly secured by the appeal bond given by your petitioner, and he is ready and willing, and has offered, and continues to offer, to make it secure in case the ultimate decision shall be against him, by any additional security that may be deemed adequate for that purpose.

2d. Because the execution of the said order would subject your petitioner to needless and ruinous sacrifices on his part, without any possible benefit or advantage to any of the litigating parties; and in the event of an ultimate decision in his favour, will moreover fix upon him an inequitable and certain loss of the interest on the large sum of money mentioned in the aforesaid order, amounting to more than four thousand dollars a year, and for which he can obtain no possible redress.

In tender consideration whereof, and inasmuch also as your petitioner is advised that the said order of February

12th is altogether erroneous, and contrary to the principles and practice of the court of chancery, may it please the court to grant to the petitioner an order, or such other process as they may deem right, to be directed to the honourable *Theodorick Bland*, chancellor, commanding and enjoining him to stay, surcease and suspend, all further proceedings on the said order by him made on the twelfth day of February, in the year eighteen hundred and twenty-five, while the aforesaid appeal is here pending, or until the pleasure of this honourable court shall be known in the premises. And your petitioner, as in duty bound, will pray, and so forth.

Notice of this petition, and of the motion for the order therein mentioned, was given to the counsel of the complainants below, and a day assigned by consent for the argument of the motion, when it was argued before BUCHANAN, Ch. J. EARLE, MARTIN, STEPHEN, and ARCHER, J.

Steuart, Taney, and Wirt, (Attorney-General of U. S.) for the motion, stated, that the questions arising on the petition and motion were,

1. Whether an appeal will lie from the order of the chancellor of December term, 1824?

2. If it will, whether such appeal is not now regularly before this court?

3. And if it is, whether this court have not the power to pass the order on the chancellor, prayed for by the petition, and if the power exists, whether the case does not authorise its exercise?

On the *first* question they referred to 1 *Harr. Chan.* 454. 1 *Wooddison*, 232. 1 *Newl. Chan. Pr.* 68. *The Warden and Minor Canons of St. Pauls vs. Morris*, 9 *Ves.* 316. *Anon.* 1 *Ves. jr.* 92. *Green vs. Winter*, 1 *Johns. Ch. Rep.* 81. *Barrow vs. Rhinelanders*, 3 *Ibid* 123. *Snowden et al. vs. Dorsey et al.* 6 *Harr. & Johns.* 114. *Buel vs. Street*, 9 *Johns. Rep.* 443. *Cowper's Plead.* 339. 2 *Madd. Chan.* 290. *Bowen vs. Cross*, 4 *Johns. Chan. Rep.* 377. 1 *Harr. Chan.* 191. *Livery vs. Wilson*, 1 *Ves. & Beames*, 148. *Jennings vs. Merton College*, 8 *Ves.* 79. *Perry vs. Philip*, 10 *Ves.* 33. *Strange vs. Collins*, 2 *Ves. & Beames*, 162. *Warfield vs. Warfield*, 5 *Harr. & Johns.* 459, 467. 3 *Blk. Com.* 56. *Huguenin vs. Baseley*, 15 *Ves.* 184. The acts of assembly of 1713, *ch.* 4; 1715, *ch.* 41; 1721, *ch.* 14;

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1729, *ch. 3*; 1785, *ch. 72, s. 27*; and 1818, *ch. 193. Green vs. Winter*, 1 *Johns. Chan. Rep.* 81. *Consequa vs. Fanning*, 3 *Johns. Chan. Rep.* 364. *S. C. Ibid*, 590. *Barrow vs. Rineland*, *Ibid*, 615. *Smith vs. Smith*, 4 *Johns. Chan. Rep.* 447. *Holmes vs. Remsen*, *Ibid*, 482. *Snowden vs. Dorsey*, 6 *Harr. & Johns.* 114.

On the *second* point they contended, that if it was a case fit for an appeal, the chancellor had no authority to refuse it. Though the usage is to apply for an appeal in the form of a prayer, yet in all cases where an appeal properly lies, the party is entitled to it *ex debito justitiæ*. This being the case, and the record here having been transmitted in the manner directed by the act of 1713, *ch. 4*, the cause is now properly before this court. They referred to the acts of assembly before stated.

On the *third* question, they contended, that the right to pass the order on the chancellor, prayed for by the petition, was incident to the right to entertain the appeal. They cited *Eden on Injunc.* 229. *Huguenin vs. Baseley*, 15 *Ves.* 184. *The Warden, &c. vs. Morris*, 9 *Ves.* 316. *Gwynn vs. Lethbridge*, 14 *Ves.* 585. *Monkhouse vs. The Corporation of Bedford*, 17 *Ves.* 380. *Way vs. Foy*, 18 *Ves.* 452. *Willan vs. Willan*, 16 *Ves.* 88, 216. *Waldo vs. Caley*, *Ibid*, 206. *Green et al. vs. Winter*, 1 *Johns. Chan. Rep.* 77. *Messonier vs. Kauman*, 3 *Johns. Chan. Rep.* 66. *Riggs vs. Murray*, *Ibid*, 160. *Culley vs. Hicklin*, 2 *Bro. Chan. Ca.* 182. *Fox vs. Mackreth*, 3 *Bro. Chan. Ca.* 45, (& note;) and *Strange vs. Harris*, *Ibid*, 365.

Emory, and *Winchester*, against the motion. In all cases where a defendant in chancery admits himself to be a mere stakeholder of a fund in controversy, he may be compelled to bring it into court, there to await the final disposition of the case. The design of this proceeding is to secure the persons really interested from the insolvency or dishonesty of such a defendant, and to take from him the temptation of spinning out the controversy. *Gordon vs. Rothley*, 3 *Ves.* 571. *Quarrell vs. Beckford*, 14 *Ves.* 177. *Fox vs. Mackreth*, 3 *Bro. Chan. Ca.* 45. *Blake vs. Blake*, 2 *Sch. & Lef.* 26. *Hatch vs. ———*, 19 *Ves.* 116. *Freeman vs. Fairley*, 3 *Mer.* 29. *Bradshaw vs. Bradshaw*, 2 *Mer.* 492. *Lynn vs. Buck*, 3 *Madd. Chan. Rep.* 280. It is admitted on the other side, that an order of this

Description may be had, where a defendant clearly admits himself to be only a depositary by his answer. In this case the appellant admits the execution of the two contracts, stated in the bill, between himself and *Heyland*, and that he received the amount in dispute in this case under those contracts. If then the true construction of the contracts is, that he was to hold the amount received under them for the use and benefit of the holders of the bills drawn by *Heyland* on *W. & J. Bell, & Co.* he admits himself to be a stakeholder only, as clearly as if he had expressly said so in his answer. They here went into an examination of the contracts. They then stated the questions to be—1. Is this a case in which an appeal lies? 2. If it is, is the appeal properly before the court, and does it, *per se*, suspend the proceedings below? 3. Has this court power to interfere in the manner prayed for?

On the *first* question, they referred to the same acts of assembly referred to by the appellant's counsel, and *Anon.* 1 *Ves. jr.* 93. *Snowden et al. vs. Dorsey et al.* 6 *Harr. & Johns.* 114.

On the *second*, to *Smith vs. Dorsey*, (*ante* 261.)

On the *third*, to *Briscoe et al. vs. Ward*, 1 *Harr. & Johns.* 165. 3 *Blk. Com.* 42, 30. 1 *Wooddison's Lect.* 232. 1 *Blk. Com.* 160; and *Sullivan's Lect.* 413.

BUCHANAN, Ch. J. delivered the opinion of the court. The first question which presents itself for consideration, is whether the order of the chancellor, of the twelfth of February 1825, is of such a character as to form a fit subject of appeal to this court? That an appeal will not properly lie from every order of the court of chancery, such as mere practical orders made in the progress of a cause, or orders preparative of a cause for final hearing, and which do not affect the rights of the litigating parties, is most certain, and appeals of that description will never receive the countenance of this court. If it were otherwise, it would be found difficult, if not impracticable, ever to bring a much controverted suit to issue, at every step in the progress of which it may be necessary to make an order of some kind or other. There is, however, much difficulty in drawing a precise line between such orders as furnish sufficient grounds of appeal, and such as do not, so as effectually to guard against the mischief of occasional

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hardship and injustice on the one side, and vexatious delays on the other. No fixed and definite rule can well be established, but every case must, in some measure, depend upon its own peculiar circumstances. In *Snowden's Ex'rs. vs. Dorsey*, decided in this court at the June term 1823, the order appealed from settled nothing in dispute between the parties, it decided no question of right between them, but left the matter in controversy open for future adjudication, and, in the words of the chancellor, was only preparatory to a final decree, the decision therefore was made with a view to the particular features of that order, which bore no impress of the chancellor's judicial opinion upon the merits of the case, consequently the party was in no way aggrieved, and there was nothing for the authority of an appellate court to act upon.

But where there is a decretal order passed upon the issue in a cause, in relation to the subject matter in controversy, which decides and settles the question of right between the parties, there an appeal will properly lie.

And whether an appeal will lie in any given case, is perhaps a question proper to be decided by this court only, being a question relating to its jurisdiction touching the rights of the citizen, which can be controled by no other court.

The main question presented by the bill and answer in this cause, is whether the money in controversy between the parties was deposited with *Hugh Thompson* by *Marcus Heyland*, for the use and benefit of the holders of certain bills of exchange which had been drawn by *Heyland*; or was paid to, and received by *Thompson* for his own use, in discharge of a debt due to him from the house of *William and John Bell & Co.* On that question the parties are directly at issue, the bill expressly charging that the money was so deposited for the use and benefit of the holders of the bills of exchange, and the answer of *Thompson* positively denying it, and averring that it was paid to him for his own use, and on account of a debt due to him from *William and John Bell & Co.* The solution of which question depends upon the construction of an agreement entered into on the 8th January 1811, between *Thompson* and *Heyland*, and filed as an exhibit in the cause.

It is obvious, therefore, that a decision involving the

construction of that agreement, is a decision of the whole matter in controversy, so far at least as *Thompson* is concerned.

The chancellor has given a construction to that agreement, and in doing so has expressly decided, "that *Thompson* has no right or title whatever to the money" in controversy; and on that decision, the order of the 12th of February 1825, to bring the money into court, is founded; in which order also the chancellor says explicitly, that *Thompson* received the money from *Heyland*, for the use of *Heyland's* creditors, the holders of the bills of exchange. The order then was passed upon the issue in the cause relative to the subject matter in dispute, and involves a decision of the question of right between the parties. It is of a character to draw after it the coercive process of the court of chancery, and as distinctly decides the matter in controversy, so far as respects *Thompson*, as, if it was a final decree, and if wrong, is as much calculated to aggrieve the party, and therefore as properly the subject of an appeal.

The question next to be considered is, whether an appeal from that decretal order of the chancellor has been regularly taken, and properly brought before this court?

The act of 1713, *ch.* 4, for regulating writs of error, and granting appeals from and to the courts of common law, &c. directs, (*sec.* 4, 5,) as the "method and rule of prosecuting appeals and writs of error," that the party appealing, or suing out a writ of error, shall procure a transcript of the full proceedings of the court from which the appeal shall be made, or against whose judgment the writ of error shall be brought, under the hand of the clerk of the said court, and seal thereof, and shall cause the same to be transmitted to the court before whom such appeal or writ of error is or ought to be heard, tried and determined; and that all appeals so made shall be admitted and allowed by the superior courts to whom such appeals shall be so made in nature of a writ of error; and that every clerk of a court shall, at the time of the sitting of any court to which he belongs, and when any appeal shall be demanded, enter a memorandum of such demand, as well in his court's proceedings, as in the fair records of the proceedings of such court, under a penalty prescribed.

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This act, it will be perceived, has no relation to appeals from chancery; but by the *third* section of the act of 1729, *ch. 3*, appeals from the court of chancery to the court of appeals, are directed to be prosecuted in the same manner as appeals from the courts of common law are. That manner, it is seen, is to demand an appeal, to procure a transcript of the proceedings under seal, and cause it to be transmitted to the appellate court, to be there admitted and allowed; of which demand, it is the duty of the clerk to enter a memorandum as well in his court's proceedings, as in the fair records of the proceedings of such court. All which has been done in this case; the appeal was demanded in the ordinary and usual mode, by way of motion to the chancellor to grant an appeal, which he refused.

A writ of error is mandatory, and does not leave it in the discretion of the subordinate tribunal to refuse or assent to the cause being carried up. By the laws of this state, appeals are placed upon the same footing with writs of error, and the same effect and operation given to them, with directions to the appellate court to admit and allow them. It was not, therefore, necessary that the chancellor should grant the appeal demanded in this case, to enable the party to bring it up; he was entitled to it as a matter of right, which could not be withheld, and had nothing to do, but to pursue the mode of prosecuting it, which is directed by the acts of 1713, *ch. 4, s. 4, 5*, and 1729, *ch. 3, s. 3*. This appears to have been done, and he is, we think, *rectus in curia*.

In *England* it has been thought right in principle that appeals should lie from chancery to a tribunal of ulterior jurisdiction, the House of Peers, without consulting the will of the chancellor on the subject. In this state the same principle is recognized, and this court, the court of appeals, is constituted the appellate tribunal; the difference resting only in the constitution of the respective appellate courts, and in the particular manner of carrying up or prosecuting appeals; the mode there being by *petition*, to the court of last resort, and here, by *demanding* an appeal according to the directions of the acts of assembly; but neither there or here, is it necessary that the appeal should be allowed by the chancellor, nor is any power vested in him to withhold it; it lies *ex debito justitiæ*, and is not granted by the chancellor *ex gratia*. Indeed, if not

distinctly admitted, it was scarcely denied by the counsel who closed the argument on the part of the complainants in the bill, that the appeal is properly before us. But it is contended that this court, constituted as it is, a mere appellate tribunal, without any original jurisdiction, has no authority to interpose, by order or otherwise, to suspend further proceedings in chancery, pending the appeal, on the matter from which the appeal is made.

It is difficult in this state to ascertain what has been the practice at different periods of our juridical history. Before the year 1729, the ultimate appeal was at one time to the King in Council; and by an act of the legislature of the then province, passed in the year 1721, appeals were given to the governor and council, but no mode of prosecuting or carrying them up was provided, and probably the mode of carrying up appeals in *England* was formerly pursued here.

But be that as it may, (and as far as concerns this case it is unnecessary to inquire,) the manner of prosecuting appeals does not now depend upon mere practice, but is expressly regulated by the positive provisions of the acts of 1713, *ch. 4, s. 4, 5.* and 1729, *ch. 3, s. 3.* The *second* section of the act of 1713, *ch. 4,* provides, that an execution upon a judgment obtained in a court of common law, shall not be stayed or delayed, or any supersedeas granted upon any appeal or writ of error from any such court, unless at the time of making the appeal, or suing out the writ of error, a bond shall be given with sufficient sureties, such as the justices of the court by whom the judgment is given, or the keeper of the seal, to whom application shall be made for such writ of error, shall approve, in double the amount of the sum recovered, &c. That section is confined exclusively to judgments obtained in courts of common law, and is not extended by the act of 1729 to decrees in chancery. There is, however, a practice of great antiquity grown up in chancery, to file a bond, at the time of taking an appeal from a decree of that court, on which all proceedings are stayed pending the appeal. This practice is supposed to owe its origin to the act of 1713, and to have been adopted in chancery by way of analogy to the provision of the *second* section of that act, in relation to the bonds required to be given in cases of appeal from judgments rendered in courts of common law,

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which probably was the case; but as no appeal or writ of error will lie, except on a *final* judgment in a court of common law, that analogy can only hold in cases of appeal from *final* decrees in chancery; and there being nothing in the act of assembly prohibiting a stay of execution on appeals from chancery, without bond, the question is presented, whether if in such a case the appeal itself does not operate as a supersedeas, the power to suspend proceedings in chancery, pending the appeal, any where exists, and if it does in what tribunal it abides?

Formerly in *England* an appeal to the House of Lords had *per se* the effect to stay proceedings in chancery, pending the appeal. That rule has since been changed, and now the general rule there is, that an appeal does not stay proceedings or execution, which can only be effected by order of the chancellor, on application made for that purpose, or by a special order of the House of Lords, which applications are made indiscriminately to the superior or inferior tribunal, though most regularly to the former; and the power of the House of Lords to cause a suspension, by special order, of proceedings in the court of chancery pending the appeal, is no where questioned, but is conceded as a necessary incident to its appellate powers.

In the state of *New York* the old rule in *England* has been adopted, and there the appeal does in the first instance stay proceedings on the matter or point appealed from, and the party wishing to proceed must, before he can do so, *apply to the chancellor for leave, (unless the court of errors should at the time be in actual session, and in possession of the cause,)* which is granted or not according to the circumstances of the particular case.

The constitution and principles of the court of chancery in this state, as in *New York*, originally emanated from the court of chancery in *England*, from which source we derive our principal stock of information in chancery jurisprudence; and the general rules governing the court of chancery there, so far as they are applicable, have been adopted here, and are constantly practiced upon. In *Huguenin vs. Baseley*, in *15 Vesey*, 182, it is said by Lord *Eldon*, (in reference to the question whether an appeal to the House of Lords stayed proceedings pending the appeal,) to be very difficult to state positively what the law was before the year 1807. But by a general order of the House of Lords made in that year, in its appellate judicial

and not legislative character, and adopted in conformity to the practice in chancery for a very long course of years, the rule is now settled, that an appeal has not the effect to stay proceedings; and in the same case the Lord Chancellor observed, it was "much more expedient that the application for an order to stay proceedings should be made to the House of Lords than to the court below."

The understanding in this state, (so far as the practice of filing a bond at the time of appealing affords any evidence of it.) is, that an appeal does not of itself stay execution of the decree; which understanding may have originally been borrowed from the practice at the time, of the court of chancery in *England*, and we have now no disposition to shake it, and can perceive no sufficient reason why it should not be recognized and adopted as a fixed and settled rule for the government of the court of chancery here. But it is manifestly necessary, to the ends of justice, that there should be a power in special cases to suspend proceedings on the matter appealed from; therefore in adopting the rule, that an appeal does not stay proceedings, we adopt it with its necessary incidents, which are, that pending the appeal, proceedings may be stayed either by order of the chancellor, on application made to him for that purpose, or by a special order of this court, on such terms as the peculiar circumstances of each particular case may be found to require.

The power of the House of Lords to stay or suspend proceedings by special order pending an appeal, is not an arbitrarily assumed power, but is incidental to that body, not in its legislative, but when sitting in its judicial character only, and it is necessarily incident to this court, to preserve the usefulness of its appellate jurisdiction. If it were otherwise, cases might arise in which the appeal would be but as a shadow, pending which the substance might be lost. It cannot be necessary to go into a specification of cases of that description, they must present themselves to every mind.

In this case, after the appeal was made, an application was preferred to the chancellor, to suspend proceedings on the order appealed from, which was refused, perhaps without an examination by the chancellor into the extent of his powers in relation to that subject.

That he had the power to suspend further proceedings on the matter from which the appeal was made, on proper

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and reasonable terms, we have not the smallest doubt, and as little, that the same power also rests with this court, having the right of revision, we have all the powers necessary to the beneficial exercise of that right.

Is this then a fit case for the interposition of this court? The order of the chancellor is, that the appellant shall bring into court an amount exceeding \$70,000, the use or interest of which sum, amounting to more than \$4000 a year, would, by an enforcement of the order pending the appeal, be wholly lost to him, without any benefit whatsoever to the complainants; whereas the injury to the appellant would be irreparable, since in no event of the cause could the lost interest be restored to him, or any compensation for it be made. It is emphatically in such a state of things, that the power of this court, to cause by special order a suspension of proceedings on the matter appealed from, should be exercised, and not lightly, or in every cause; but where the court sees that if the decree or order appealed from should turn out to be wrong, the enforcement of it, pending the appeal, would produce an irreparable injury to the party appealing, it ought and will interpose to prevent such injury, or all the purposes of its institution, as an appellate court of chancery, will not be answered. But it will only interpose in such manner, and on such terms, as will not be prejudicial to the adverse party. Under the special circumstances, therefore, of this case, we think that the application by the appellant, for a special order to suspend proceedings in the court of chancery, on the order of the twelfth of February 1825, pending the appeal in this court from that order, ought to be gratified, on a bond being filed in that court by the appellant to the complainants, with condition suited to the nature of the case, and sufficient sureties to be approved by the chancellor.

The court, therefore, pass the following order:

Western Shore, State of *Maryland*, sct.

By the Court of Appeals, June term, 1825.

Whereas it appears by the record of the proceedings of this court, that in a certain suit depending in the court of chancery for this state, in which *John M. Kim, &c.* are complainants, and *Hugh Thompson* and *John Bell* are defendants, an order was passed by the chancellor, bearing

date the 12th day of February 1825, which is in the following words, viz. [*Here follows the chancellor's order.*] And whereas the said *Hugh Thompson* hath appealed from the said order of the chancellor to this court, which appeal is now here pending. It is thereupon, this 11th day of July, in the year 1825, upon the petition of the said *Hugh Thompson*, the above named appellant, ordered by the court of appeals for the western shore, that all further proceedings in and upon the said order, and all process to enforce the same, be stayed and suspended in the court of chancery until the said appeal be heard and determined by this court; Provided the said *Hugh Thompson* shall file in the court of chancery a bond to the complainants in the court of chancery, in the penalty of one hundred and fifty thousand dollars current money, executed by the said *Hugh Thompson*, with sufficient sureties to be approved by the chancellor, conditioned, that if the said *Hugh Thompson* shall not prosecute with effect the appeal by him made and now depending in the court of appeals for the western shore, from an order passed by the court of chancery, on the twelfth day of February eighteen hundred and twenty-five, in a cause in that court depending, in which *John M^cKim*, junior, &c. are complainants, and *Hugh Thompson* and *John Bell* are defendants, ordering the said *Hugh Thompson* to bring in to the said court, on or before the fourteenth day of April then next, the sum of thirty nine thousand five hundred and seven dollars and eighty-five cents, being the value of eight thousand eight hundred and eighty-nine pounds five shillings and four pence, sterling, money of *England*, together with legal interest thereon from the first day of January in the year eighteen hundred and twelve; and shall not perform and fulfil the said order in case the same shall be affirmed by the court of appeals; and also shall not perform and comply with any order or decree, which shall be made on the said appeal by the court of appeals, and also shall not satisfy and pay to the said complainants all costs and damages that shall be awarded by the court of appeals, then the said bond to be and remain in full force and virtue, otherwise of no effect. And it is further ordered by this court, that a copy of this order, attested by the clerk of this court, and certified under the seal thereof, be forthwith transmitted by the clerk to the court of chancery.

MOTION AND ORDER GRANTED.

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APPEAL from *Washington* county court. Ejectment for two tracts of land, one called *Walnut Bottom*, and the other *The Brothers*, or *The Resurvey on the Brothers*, brought in *Allegany* county court, and transmitted to *Washington* county court, on the suggestion and affidavit of the lessor of the plaintiff that a fair and impartial trial could not be had in the former court. The defendant, (the appellee,) took defence for a tract of land called *George's Adventure*, and for one called *Crooked Meanders Resurveyed*, as by him located on the plats.

Under the act of 1766, ch. 14, s. 4, one justice of the peace has no authority to take the probate of a letter of attorney for the acknowledgment of the deed of a non-resident grantor.

Nor has he any such authority under any other act of assembly, or under the common law.

The probate before mentioned under the said act of 1766, must be either in the provincial or county court, or before one justice of the provincial court, or two justices of the county court, where the land lies.

The safest course is to prove the letter of attorney before the same persons who take the acknowledgment of the conveyance; and *quere*, whether it is not the only course?

A deed of a non-resident grantor, acknowledged by an attorney under a letter of attorney proved before one justice of the peace only, is invalid.

If possession has gone with such a deed, yet if a plaintiff in ejectment produces the deed as evidence of his title, there can be no presumption that the same was legally executed and acknowledged, tho' if it was not produced, a legal conveyance might be presumed.

If a party objects to the competency of a witness offered on the adverse side, and the court sustain the objection, and the party making it, afterwards waives it, and consents that the witness be examined, the party offering the witness has no right to require of the court to decide that he is competent and pendent of the waiver of the objection.

A certificate of a clerk of a county court, that the two persons, before whom a deed purports to be acknowledged, were at the time of such acknowledgment and still are "two justices of the peace for the county aforesaid, and to all certificates given by them as such, due faith and credit is and ought to be given, as well in courts of justice as thereout," is a sufficient certificate to authorise the recording of the deed among the records of the county in which the land conveyed by such deed lies.

A mixed possession will not prevent the presumption of a deed, unless the same is held by both parties claiming title to the same land.

Where a plaintiff in ejectment produces a patent to B for the land for which he sues, dated in 1774, and produces a deed to the same land from C to B, dated the 7th of November 1785, containing a recital of a deed also for the same land, from B the patentee, to C, and proved a possession in C, of a part of said land, until 1785, and in F, claiming and holding, and in the assor of the plaintiff claiming under F, and all claiming to hold such possession under a title to the whole tract, a conveyance from the patentee to C, may be presumed,

1. At the trial, the plaintiff offered in evidence the plats and explanations returned in this cause, and offered evidence that the locations thereon by him made, were truly made. The defendant then offered in evidence the same plats and explanations, and that the locations thereon by him made were also truly made. The plaintiff then offered in evidence a grant for the tract called *Walnut Bottom*, located on the plats, formerly lying in *Prince George's* county, but then lying in *Frederick* county, made to *George Mason* on the 25th of March 1756. He also gave in evidence that the lessor of the plaintiff, and those claiming under him, had been in the possession of *Walnut Bottom* ever since the year 1783, and continually exercised acts of ownership over it, erected buildings thereon, cleared and cultivated it, and sold a part, and laid out the town of *Cumberland* on it in 1785; and offered in evidence the locations and explanations of the defendant on the plats. The plaintiff then, in order to show title in himself to this tract, offered in evidence a deed for it from *George Mason*, the patentee above mentioned, to the lessor of the plaintiff. This deed is stated to have been made on the 25th of October 1783, between *George Mason*, of *Fairfax* county, in the commonwealth of *Virginia*, of the one part, and *Thomas Beall*, of *Samuel*, of the county of *Washington*,

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in the state of *Maryland*, whereby, in consideration of the sum of £1407 10 current money, *Mason* conveyed to *Beall* a tract of land called *Walnut Bottom*, and also a tract of land called *Lime Stock Rock*, the former tract granted to the said *Mason* on the 25th of March 1756, and the latter to *Daniel Cresap* on the 10th of August 1753. Annexed to this deed was a letter of attorney, executed by *Mason* on the 25th of October 1783, in the presence of three witnesses, authorising and empowering *Alexander Clagett* and *Daniel Cresap*, junior, of *Washington* county, or either of them, in his (*Mason's*) name to acknowledge the said deed according to law. On the 30th of October 1783, in *Montgomery* county, *Samuel Brooke Beall* of the said county, one of the subscribing witnesses to the above letter of attorney, made oath before *Richard Thompson*, that he saw *George Mason* sign, seal and acknowledge, the above power of attorney, as his act and deed, and also that he saw *William Mason* and *John Mason*, (the other subscribing witnesses,) sign their names as witnesses thereto, &c. The clerk of *Montgomery* county court, on the 30th of October 1783, certified under the seal of the court as follows: "that *Richard Thompson*, esquire, before whom the above probate is taken, and who has thereto affixed his signature, was at the time of taking and affixing the same, and still is, one of the justices of the peace for the county aforesaid, legally authorised and assigned, and to all probates, &c. by him so signed, due faith and credit is and ought to be given, as well in justices court as thereout." On the 8th of November 1783, the deed was acknowledged by "*Alexander Clagett*, attorney for the within mentioned *George Mason*, and by virtue of the authority in him vested by the power of attorney," before two justices of the peace for *Washington* county, to be the act and deed of the said *Mason*. To the admissibility of this deed, the defendant objected; and the court, [*Buchanan*, Ch. J. and *T. Buchanan*, A. J.] sustained the objection, and refused to suffer it to be read in evidence. The plaintiff excepted.

2. The plaintiff then offered in evidence a grant of a tract of land called *The Brothers*, lying in *Frederick* county, issued to *Thomas French*, (being a resurvey on *Walnut Bottom*,) on the 29th of November 1774. And also a deed from *James Clarke*, of *Baltimore Town* and county, to *Abra-*

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ham Faw, of *Frederick Town* and county, dated the 7th of November 1785, for the said tract of land, reciting that "Whereas the aforesaid *James Clarke* is seized in his demesne as of fee and right, of and in a tract or parcel of land situate, lying and being in *Washington* county, called *The Brothers*, containing by estimation nine hundred and forty-three acres of land, which said tract of land was conveyed to the aforesaid *James Clarke* by a certain *Thomas French*, on the twenty-third day of October one thousand seven hundred and seventy-nine, as per his deed will appear, and was granted to the said *Thomas French* by the proprietor of the then province of *Maryland*, by virtue of a proclamation warrant, as per his patent will appear, bearing date the twenty-ninth day of November one thousand seven hundred and seventy-four, reference being thereunto had: And whereas the said *James Clarke* hath bargained and contracted with the above named *Abraham Faw*, for the sale of the above said tract or parcel of land, for the sum of two thousand seven hundred pounds current money. Now this indenture witnesseth," &c. This deed was acknowledged by *Clarke*, in *Baltimore* county, on the day of its date, before *Isaac Vn. Bibber* and *Thomas Russell*, stating themselves to be two of the justices of the peace for the county aforesaid; and annexed to it was a certificate of the clerk of the county court of *Baltimore*, certifying "that *Isaac Vn. Bibber* and *Thomas Russell*, gentlemen, before whom the above acknowledgment was made, and who have thereunto subscribed their names, were at the day of the date thereof, and still are, two justices of the peace in and for the county aforesaid, and to all certificates, by them given as such, due faith and credit is and ought to be given, as well in courts of justice as thereout." He also offered in evidence a deed from *Abraham Faw* to *Thomas Beall*, the lessor of the plaintiff, for the said tract of land, dated the 24th of September 1810, and stated to be made "between *Abraham Faw*, of the Town of *Alexandria*, in the District of *Columbia*, of the one part, and *Thomas Beall*, of *Samuel*," &c. reciting, that *Faw* was seized in fee simple of and in a tract of land situate, lying and being, in *Allegany* county, contiguous and adjacent to the Town of *Cumberland*, called *The Brothers*, or *The Resurvey on the Brothers*, which was conveyed to the said *Faw* by *James Clarke*, of *Baltimore* county, by deed dated

the 7th of November 1785, and which was conveyed to the said *Clarke* by *Thomas French*, then also of *Baltimore* county, by deed dated the 25d of October 1779, and which tract was granted to the said *French* on the 29th of November 1774, &c. This deed was acknowledged on the 24th of September 1810, before the mayor of *Alexandria*, who certified the fact under the seal of the corporation. Annexed to the deed was a letter of attorney executed by *Faw* on the 24th of September 1810, authorising *Roger Perry*, esquire, of *Cumberland*, for him, and in his name and stead, to make any acknowledgment required by law for the full execution of the said deed; which letter of attorney appeared, by the certificate of the mayor of *Alexandria*, to have been acknowledged before him by *Faw* on the same day. On the 26th of September 1810, in *Montgomery* county, *Thomas L. Maccubbin*, one of the subscribing witnesses to the letter of attorney, appeared before a justice of the peace of that county, and made oath that he saw *Faw* sign and acknowledge the letter of attorney to be his act and deed. The clerk of *Montgomery* county court certified, under his hand and seal of the court, on the 26th of September 1810, that *Jesse Leach*, gentleman, before whom the above probate appeared to have been made, and whose name was thereto subscribed, was at the time a justice of the peace in and for the county aforesaid, duly commissioned and sworn. On the 2d of October 1810, before two justices of the peace in and for *Allegany* county, "*Roger Perry*, of *Cumberland*, named in the foregoing power of attorney, the execution whereof hath been duly proved, and by virtue and in pursuance of the authority thereby given," acknowledged the annexed deed to be act and deed of *Abraham Faw*, &c. The plaintiff then offered to prove by a certain *George Hoffman*, that the aforesaid *James Clarke* was in possession of the aforesaid tract called *The Brothers*, from the year 1779 to the year 1785, holding and claiming the same as his own. That the aforesaid *Abraham Faw*, after the deed aforesaid made to him, entered upon the said land, and held and possessed the same as his own, claiming under the said deed to him, until he sold to *Beall*, the lessor of the plaintiff, and that from the time of the said last mentioned sale, the lessor of the plaintiff, and those claiming under him, have held and possessed the said land, claiming

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and holding the same as their own under the said deed. The defendant then offered in evidence, from the plats and explanations, that the plaintiff had located a deed from the lessor of the plaintiff to said *Hoffman*, for part of a tract of land called *The Brothers*, held by the witness under the lessor of the plaintiff, but which part was clear of all dispute as to the location of the tract, and objected that said *Hoffman* was not a competent witness for the plaintiff, to prove the possession herein before stated, and offered by the plaintiff to be proved by him. The court [*Buchanan*, Ch. J. *Shriver*, and *T. Buchanan*, A. J.] sustained the objection, and refused to let the said testimony go to the jury. To this opinion the defendant prayed leave to except. When the exception was prepared and ready to be signed by the court, the defendant's counsel withdrew all objection to the competency and credibility of the said witness, which might arise from the opinion of the court, or from any other cause. The court were then of opinion, that said witness, independent of the admissions, above stated, of the defendant's counsel, was competent to prove the facts offered by the plaintiff to be proved by him. The plaintiff, by his counsel, refused, under the opinion above stated, to examine the witness to the facts to which he had been declared incompetent by the court, in the opinion first herein before stated, and prayed the opinion of the court that said witness was competent to prove said facts. Which opinion the court refused to give, being of opinion, that without such admission said witness would not be competent; and further, that it was immaterial and unnecessary to decide on the competency of said witness, after all objections to him had been withdrawn by the defendant, and an offer made that the witness should be sworn to the jury without any prejudice to his testimony from the opinion first expressed by the court. The plaintiff excepted.

3. The plaintiff then offered to swear *James Hook* as a witness, to prove the possession of *The Brothers* by the lessor of the plaintiff, and those claiming under him, for twenty-five years before the bringing of this suit, and that the said tract, *The Brothers*, and the tract called *Walnut Bottom*, as located on the plats, were correctly located by the plaintiff. The defendant objected to the admissibility of this witness, and read in evidence a deed from the lessor of the plaintiff to *John S. Hook*, dated the 16th of April 1816, which is located on the plats, being for

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a part of the tract called *The Brothers*, and beginning in the seventeenth line of *Walnut Bottom*. And then swore said *Hook* on his *voir dire*, who stated that he did not know whether or not he was interested in the event of this cause, or would gain or lose by the event of it; that he had purchased of his father, *John S. Hook*, part of the land mentioned in the aforesaid deed, and paid for the same, and that the part he purchased is free from this dispute as respects the location of the land. That his father has promised if the land in dispute should be recovered, that he will sell it to him, but if it is not recovered, he is not to have it, and not to pay for it; that his father's promise is a verbal one, but that he believed if his father lives that he will fulfil his promise. The court were of opinion that the witness was incompetent, and refused to suffer him to be sworn to the jury. The plaintiff excepted. After this opinion was given, and the plaintiff had prayed leave to except, the defendant withdrew all objections to the competency or credibility of the witness, that could arise from the opinion of the court, or from any other cause, and offered to permit him to be sworn to the jury, and the court were thereupon of opinion, and so directed, that he might be sworn to the jury. But the counsel for the plaintiff refused, under such an opinion from the court, to swear the witness to the jury, and prayed the opinion of the court that the witness was competent for the purpose for which he was offered, independent of any admissions made by the defendant. This opinion the court refused to give, being of opinion, that without such admission he would not be competent, and further, that it was immaterial and unnecessary to decide on the competency of the witness, after all objections to him had been withdrawn by the defendant, and an offer made by him that the said witness should be sworn to the jury, without any prejudice to his testimony from the opinion first expressed by the court. The plaintiff excepted.

4. The plaintiff then offered in evidence, by *Benjamin Wiley*, a competent witness, that the witness knows the tract of land called *The Brothers*, and lived on it in 1782. In 1782 *The Brothers* was all in woods. *James Clarke* lived in *Baltimore*, and claimed title to the land as his own, and agreed to lease a part of it to the witness, who went on the land in the summer of 1782, under that agreement, and cleared about an acre, and fenced it in and built a

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cabin near the lines of *Walnut Bottom*; but after seeing the lines run, and finding the lines of *Walnut Bottom* then held by *George Mason* took in part of the land he expected to lease, he refused to take the lease, and left the land, and went to *Baltimore*, after having remained on the land eight or ten months. Witness lived in *Baltimore* from 1783, at which time he left *The Brothers* until 1787, when witness again returned with his family. He lived in *Virginia*, about two and a half miles from *Cumberland*. In 1782 the witness understood from *James Clarke* and *Charles Clinton*, that the latter was agent for *Clarke*, and had the care of *The Brothers*, as agent of *Clarke*; at that time *Clinton* lived on *Walnut Bottom*, where the town of *Cumberland* now stands, and it was *Clinton* who pointed out to him the land he was to lease from said *Clarke*, as before stated, and part of which was found on survey to be in *Walnut Bottom*. In 1785 witness went to *Cumberland*, *Clinton* was then gone. He does not know who at the time had the care of *The Brothers*, and thinks no body was living on it. *Clinton* left *Cumberland* in 1783. In 1788 or 1789, *David Watkins* cleared a field on *The Brothers*, and held the same some years, claiming under *Thomas Beall*, the lessor of the plaintiff. From some time between 1790 and 1795, to this time, *Beall*, and those claiming under him, have been in the actual possession and occupation of different parts of that part of *The Brothers* lying to the east of *Wills* creek, by cutting timber and clearing when it suited him, and leasing out and selling parts of the said tract to different persons, *Beall* claiming at the same time title to the whole tract as having been purchased by him from *Faw*, except where he *Beall* had sold out parts of it. Witness knows nothing as to the possession on the west side of *Wills* creek, between 1795 and 1800. *James M'Coy* cleared a field, claiming under *Beall*. On the cross examination by defendant, witness stated, that about twelve years ago he saw some of the lines of *The Brothers* run, one of them run into the field of Colonel *Lamar*, who never claimed or held any of his land, under the title of *The Brothers*, to the knowledge of the witness. This running was made by order of the court. The plaintiff then offered in evidence, by *Michael Fisher*, a competent witness, that he went to live in *Cumberland* in 1792, and has known the land called *The Brothers* from that time,

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although he did not know by what name it was called until 1793. *Beall* was in the practice of exercising acts of general ownership over that part of the land on the east side of *Wills* creek, by cutting timber on it, and permitting others to cut timber in different places, cultivating some of it, and renting out other parts, and claiming title to the whole tract. The witness does not know the lines of *The Brothers* on the west side of *Wills* creek, located on the plats, and does not know who possessed that part, except the town of *Cumberland*, which was laid out by *Beall*, then part of the meadow land on this tract was enclosed and improved by *Beall*, and has since been enclosed by him. The plaintiff further offered in evidence, by *Dickinson Sinkings*, a competent witness, that he has known the land called *The Brothers* for about fifty years. Witness went to live in the neighbourhood of the land about 1771, and has lived in that neighbourhood ever since. About twenty-six or twenty-seven years ago, *Beall* laid off an additon to *Cumberland* on the tract called *The Brothers*, on the east side of *Wills* creek, and sold out the lots to different persons, *Beall* at the same time claiming title to the whole tract as purchased from *Abraham Faw*, except where he had sold out parts of it. Ever since that time, that is for 26 or 27 years, *Beall* has been in the habit of exercising acts of general ownership over *The Brothers*, on the east side of *Wills* creek, by cutting timber on it in different places, selling, renting and improving, different parts, and claiming title to the whole tract. The witness does not know the lines of *The Brothers* on the west side of *Wills* creek, and does not know of any acts of ownership by *Beall* on the west side. The witness does not know whether or not *Clarke* or *Faw* was ever in possession of *The Brothers*, it was in woods when the witness first knew it, and very little improvement was made on it until *Beall* got it. The plaintiff further offered in evidence, by *William M Mahon*, a competent witness, that in the year 1799 *The Brothers* stood assessed to *Abraham Faw*, and that *Beall* paid the taxes on it. Witness was collector of the taxes from 1799 until 1804, and until that time *Beall* paid the taxes. He does not know to whom it was assessed, or who paid the taxes before 1799. The witness, on his cross examination by the defendant, stated that he has known a particular field, located on the plats near the

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turnpike road, and running, &c. to be enclosed by a fence; and in the possession of the defendant, and cultivated by him since some time between the year 1796 and 1799, to the present time; also that he has known another field, also located, to be enclosed and cultivated, and possessed by the defendant, since the year 1801, and he thinks for one or two years before; also that he has known a third field, also located, to have been enclosed in the year 1804, and possessed by the defendant; he thinks it was enclosed before, but how long does not know. It has not been kept continually enclosed since the year 1804, the fence was taken away, and rails put in pens round some fruit trees that had been planted there by the defendant, who claimed it as his own. Since the year 1804 the fence has been again replaced by the defendant, and is now in his possession. The greater part of these three fields were cleared by the defendant. He began to cut timber on the first field about the year 1796, and continued to cut, clear, and enclose in all the fields, until they were all cleared and enclosed as herein before stated. The lines of the field, first mentioned in the testimony of this witness, includes a part of *Walnut Bottom* and a part of *The Brothers*. Part of said fields the defendant claims title to under the witness, who bought it of the lessors of the plaintiff in the year 1795, as a part of *Walnut Bottom*; another part is held and claimed by the defendant, as part of *George's Adventure*; another part as a vacancy taken up by defendant. The name of the land so taken up the witness does not know. When witness bought of *Beall* in the year 1795, he proposed to purchase all the land included in *Walnut Bottom*, on the west side of the town of *Cumberland*, and agreed to give him \$13 per acre for all that part of *Walnut Bottom*, to which the plaintiff agreed. Witness bought the land as agent for the defendant, and at his request. The witness told *Beall* to have the deed prepared; when the deed was about to be executed, *Beall* said he was afraid there was some mistake in it, and if there was more land in *Walnut Bottom* than was contained in the deed, and found to be so on a particular survey, that the witness must pay him for it, to which the witness agreed. The money was paid, and the witness obtained a deed from *Beall*, which was offered in evidence, dated the 7th of November 1795.

The witness afterwards conveyed said land to *Lynn*;

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Lynn went into possession of the land soon after the deed to the witness; witness lives in sight of the fields before mentioned by him, and knows of no act of ownership or possession by *Beall*, on any part of the said fields, since the deed to the witness, except occasionally surveying said lands, on disputes between the plaintiff and defendant in *Allegany* county court about the location of their lands. If any part of the fields before mentioned by witness, are included in *George's Adventure*, then the defendant had possessed such part of *George's Adventure*, in the manner before stated. Witness knows another field, which he described; some part of that field was enclosed about 25 or 26 years ago by *Zachariah Magruder*, as a part of *George's Adventure*, but the part so included is not located on the plats. *Zachariah Magruder* from the year 1792 until his death, which happened in the year 1798, or thereabouts, exercised acts of general ownership over the tract called *George's Adventure*, by cutting timber in different places, claiming and cultivating in others, and claiming title to the whole tract; and about 12 or 13 years ago the defendant entered into *George's Adventure*, claiming under the heirs of said *Magruder*, and has ever since exercised acts of general ownership over the said land, by cutting timber and wood, clearing and cultivating different parts, and claiming title to the whole; the heirs of *Magruder* exercised the same sort of ownership over the said land from his death, until the possession was transferred to the defendant. The plaintiff further offered in evidence by *Beall Howard*, esq. a competent witness, and one of the counsel for the plaintiff, and residing in *Allegany* county, that in 1813 or 1817, witness made a diligent search among the records in the office of the court of appeals, with the assistance of the clerk of that court, for a deed from *Thomas French*, the patentee of *The Brothers*, to *James Clarke*, for *The Brothers*, but without success; and in 1817 or 1818, he made a like search among the land records of *Frederick* county court, but could find no such deed, and could find no deed of any kind from *Thomas French* to *James Clarke* on said records. The plaintiff further offered in evidence, by *Jacob Myers*, a competent witness, that the witness is a clerk in the office of the clerk of *Washington* county court, and transacts the greater part of the business of that office; he has been 12 years a clerk in the office, and is familiar with

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its business. He diligently searched the records of *Washington* county court, from the beginning of them, to the 7th of November 1785, for a deed from *Thomas French* to *James Clarke*, for the tract called *The Brothers*, and could find no such deed on the land records. The records of deeds in *Washington* county begin in 1777, he can find no deed of any kind on those records from *Thomas French* to *James Clarke*. The defendant then offered in evidence, by *Roger Perry*, esq. a competent witness in this cause, that the witness went to *Cumberland*, in *Alleghany* county, in the year 1794, to reside, and has resided there ever since. That the field first mentioned in the evidence of *William M^cMahon*, herein before stated, was cleared, and the wood cut off of it in the winter of 1795, and was enclosed in the spring of 1796, by the defendant, and has remained in his possession ever since. That the second field, also mentioned in the testimony of *William M^cMahon*, was enclosed, as the witness thinks, in 1797, but that he is certain it was enclosed in 1798, and in the possession of the defendant, and has continued to be in his possession, by enclosure, ever since. That the third field, mentioned in the said testimony of *M^cMahon*, was enclosed by the defendant about the year 1799 or 1800, and an orchard planted on it. That about two years after the first enclosure of said field, the fence, or a part of it, was taken down to secure the fruit trees which had survived the ravages of the locusts; and as the orchard had never been cultivated, a great number of brushes grew up, the field was thrown open, and remained open from four to six years, when it was again enclosed by the defendant, and still remains in his possession by enclosure and cultivation. That part of the last field, mentioned in the testimony of *M^cMahon*, not included within *George's Adventure*, was enclosed by *Lynn* in 1796, and has remained in the possession, by enclosure and cultivation, of *Lynn*, to the present time. That part of the last field, included within the lines of *George's Adventure*, when the witness first knew it in the fall of 1794, except a small part of it, was enclosed and in the possession of *Zachariah Magruder*, and remained in his possession until his death. *Zachariah Magruder* resided on and exercised general acts of ownership over *George's Adventure*, by cutting timber, and cultivating parts of it. About the year 1798 *Magruder* died, and his heirs remained in

possession until about the year 1802, when *David Lynn* purchased the said land of a trustee appointed by the chancellor for the sale of the interest of the said heirs, and *Lynn* then entered into possession as aforesaid, and about the year 1802 enlarged his enclosure of that field, and has remained in its possession, by enclosure, from that time to the present. *Lynn* claims the land described above, and for which he has taken defence, part as within the lines of *Crooked Meanders* and *Crooked Meanders Resurveyed*, part as *Walnut Bottom*, purchased by *William M' Mahon* of *Thomas Beall*, and part as *George's Adventure*. The defendant further offered in evidence the patent for the tract called *George's Adventure*, located on the plats granted to *George French* of *Thomas*, on the 21st of April 1775. And also the patent for *Crooked Meanders*, granted to the defendant on the 19th of November 1790.

The plaintiff then prayed the direction of the court to the jury, that if they believed the evidence given by the plaintiff and the defendant, that they might presume that *Thomas French*, the patentee of the tract called *The Brothers*, conveyed said tract to *James Clarke* before the 7th of November 1785. Which direction the court refused to give. The plaintiff excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued at the last June term, before EARLE, MARTIN, STEPHEN, and ARCHER, J.

Taney, for the Appellant, contended, upon the *first bill* of exceptions, that the deed from *Mason* to *Beall*, the lessor of the plaintiff, ought to have been admitted in evidence—1. Because the execution of the power of attorney, by virtue of which the deed was acknowledged, was legally proved. 2. Possession having gone with the deed since 1783, it may and ought to be presumed that said power was proved before one having competent authority to take the probate.

Upon the *second* and *third bills* of exceptions, he contended, 1. That the witnesses therein named could not gain or lose by the event of the suit, and therefore were competent; and 2. If they were competent witnesses, the subsequent assent of the defendant to admit the evidence, cannot remove the error of the decision, because the opinion of the court would necessarily induce the jury to

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receive the evidence of such witnesses with suspicion and distrust.

Upon the *fourth* bill of exceptions, he contended, 1. That the facts stated show the possession of *Beall*, and those claiming under him, from the year 1782, and that upon that proof, and the other evidence stated in the record, the court ought to have directed the jury that they might presume the deed from *French* to *Clarke*. 2. That the evidence offered by the defendant, of a conflicting location of another tract of land with *The Brothers*, and of possession of parcels of land within the lines of *The Brothers*, claiming such possession under an adverse title, although it is evidence against the location of *The Brothers*, claimed by the plaintiff, is not evidence to rebut the presumption of title to *The Brothers*.

On the points under the *first* bill of exceptions, he referred to the act of 1766, *ch. 14, s. 4. Ricard vs. Williams, 7 Wheat. 109, 110. Bryden vs. Taylor, (June 1809.) Hall vs. Gittings's Lessee, (June 1809.)*

On the points under the *fourth* bill of exceptions, to *M'Comas vs. Bradford, (December 1813,)* and *Gittings's Lessee vs. Hall, 1 Harr. & Johns. 27.*

Harper and Speed, for the Appellee, on the *first* bill of exceptions, also referred to the act of 1766, *ch. 14, s. 4. Sim & Lee's Lessee vs. Deakins, 2 Harr. & M'Hen. 46. and Hall vs. Gittings (June 1809.)*

On the *fourth* bill of exceptions, to *Gittings's Lessee vs. Hall, 1 Harr. & Johns. 27. Cockey's Lessee vs. Smith, (June 1810,)* and *Mundell's Lessee vs. Clerklee (December 1814.)*

Curia adv. vult.

At this term the opinion of the court was delivered by MARTIN, J. This was an action of ejectment, instituted to recover two tracts of land, the one called *Walnut Bottom*, the other *The Brothers*, or *The Rusurvey on The Brothers*. The plaintiff having shown a title to *Walnut Bottom* in the patentee, *George Mason*, offered to read in evidence to the jury a deed from him to *Thomas Beall*, the lessor of the plaintiff, but the court were of opinion the deed was not legal evidence, and it was rejected.

It appears from the record, that at the time the deed from *Mason* was executed, *Walnut Bottom* was in *Washington*

county, and the grantor was a nonresident of this state, and resided in *Virginia*. That the deed was not acknowledged by *Mason* in person, but by his attorney, and that the letter of attorney, giving authority to make the acknowledgment, was proved before *Richard Thompson*, who is stated to be a justice of the peace for *Montgomery* county.

It was contended, that this deed could have no legal operation—1st. Because *one* justice of the peace had no authority to take the probate of the letter of attorney, and therefore it was not well and sufficiently proved according to law. 2d. If *one* justice of the peace had authority to take probate of its execution, it does not legally appear that *Richard Thompson*, before whom this probate was made, had authority to administer an oath, the clerk not having certified that he was duly *commissioned and sworn*.

The privilege of acknowledging a deed *by attorney*, was conferred by the act of 1766, *ch. 14*, and we must have recourse to that act to see if the letter of attorney was well and sufficiently proved, according to the meaning of the legislature. After declaring how deeds shall be acknowledged and enrolled, where the grantor resides within the state, the *fourth* section points out the course to be pursued, where the grantor is a nonresident of the state. It declares "that a deed made by a nonresident of the state shall be acknowledged by letter of attorney, well and sufficiently proved, either in the provincial court, or county court where the land intended to be conveyed, or the use thereof limited or declared, doth lie, or before *one* justice of the provincial, or *two* justices of the county court, as aforesaid."

It is perfectly clear that the tribunal or persons before whom the acknowledgment is made, may have the witnesses to the letter of attorney brought before them, and if they are satisfied of the due execution of the power, take the acknowledgment. Whether it must be proved before the *same* persons who take the acknowledgment, or may be proved before one of the tribunals mentioned in the act of 1766, and be acknowledged before another, as for instance, proved before one provincial justice, and acknowledged before another provincial justice, it is not necessary for us now to decide. The question presented by the *first* bill of exceptions is, whether *one* justice of the peace had authority to take the probate?

This act of assembly, giving a new remedy, and confer-

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ring a special authority, ought perhaps to receive a strict construction; but if we give the most liberal effect to the words "well and sufficiently proved;" they must mean, proved according to law, that is, proved in the manner expressly required by the act of 1766, or before some person or tribunal authorised to take its probate, independent of that act. It must be conceded, that one justice of the peace is not empowered to take the probate, *by the express words of the act*, for no authority is *expressly* given to one justice of the peace to do any act whatever by that law. Where a justice of the peace is mentioned, the law always requires the co-operation of *two* of them; thus the acknowledgment is to be made, not before *one* but *two* justices of the peace. If the legislature meant to invest *one* justice with power to take the probate, why not also give *one* authority to take the acknowledgment? It surely does not require more talents, integrity or knowledge, to take the bare acknowledgment of the deed, than to receive the testimony of the witnesses, in such a manner as to give legal effect and operation to the letter of attorney. If then this act does not *expressly* authorise *one* justice to take the probate, from whence does he derive this power? If it is by implication, still the act requires it to be "well and sufficiently proved"—that can only mean, proved before some other tribunal authorised to take the probate. How does a justice of the peace claim this right? It is not conferred on him by any other act of assembly, and we look in vain to the principles of the common law to find it. Suppose a letter of attorney had been given for any other purpose, for instance to collect debts, and it became necessary, in a trial at law, to use it, to show the authority of the agent, what would be legal evidence of its due execution? A certificate from a justice of the peace, that he had *in pais* examined the witnesses to it?—surely not—It must be proved like other deeds. The court, before whom the cause was depending, must have the witnesses before them, or in their unavoidable absence, proof of their handwriting.

The construction we give to the *fourth* section of the act is, that the letter of attorney must be proved, either before the provincial or county court, or before one justice of the provincial, or *two* justices of the county court, where the lands lie. It is certainly the safest course to prove it before the same persons who take the acknowledg-

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ment. But whether that is required by the act is a question, as before observed, not necessary now to be decided, and on which no opinion is intended to be expressed.

Having disposed of this question, it is unnecessary to examine the objection to the certificate of the clerk. The deed not having been legally acknowledged, it is perfectly immaterial whether that certificate was correct, we therefore pass it without remark.

It was contended, by the counsel for the appellant, that although a justice of the peace had no authority to take the probate of a letter of attorney, yet the jury ought to presume, from the long possession of the plaintiff, and those under whom he claims, that this letter of attorney had been duly and legally proved, or in other words, that it had been proved as required by the act of 1766. The doctrine of presumption, from long possession, is too well established to be called in question at this day. It is a doctrine founded in justice, and is intended to support the title of *bona fide* holders of land, where from accident or casualty their title papers may be supposed to be lost. It quiets the possession of estates, and ought to be sustained by the courts, where a proper foundation is laid for the presumption. But to direct the jury to presume a fact, in direct opposition to the evidence produced and relied on by the party, has never yet been countenanced by any decision we have seen. Had the plaintiff entirely withdrawn this defective deed, and then moved the court to instruct the jury, they might, from the possession and acts of ownership, presume a good deed, it would have presented a very different question. In this case, the plaintiff offered in evidence a letter of attorney, proved *in pais*, before a single justice of the peace, and produced a record to show it was thus proved, and yet calls on the jury to presume it was not proved as he has established it, but in a manner entirely different; every presumption that might have arisen from the want or absence of proof, is here rebutted and destroyed by the proof offered.

The *second* and *third* bills of exceptions are in principle alike, and do indeed present an anomaly in judicial proceedings. Witnesses offered by the plaintiff were objected to by the defendant on account of interest, and the court decided they were incompetent. The defendant then withdrew all objection to the competency and credibility of the

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said witnesses, which might arise from the opinion of the court, or from any other cause, and the court were of opinion, and so directed the jury, that the witnesses might be examined; but the plaintiff would have them received upon his own terms, or not at all, and took exception to the procedure of the court; we see nothing in those exceptions on which this court ought to hesitate a moment. Whether the witnesses offered were competent, is not a question before us. The objection made to them was withdrawn by the defendant, and if the plaintiff had not the benefit of their testimony, it was his own fault. We sit here to administer justice; and not to settle points of punctilious etiquette between the parties.

The *fourth* bill of exceptions remains to be considered. This ejectment was instituted, as before stated, to recover two tracts of land, the one called *Walnut Bottom*, the other *The Brothers*; the defendant took defence for all the land included within the lines of a tract called *George's Adventure*, and not within the lines of *Walnut Bottom*, as located by him. Also for the land included within the lines of a tract called *Crooked Meanders Resurveyed*, as comprehended within a deed from the lessor of the plaintiff to *William M. Mahon*, and a deed from the lessor of the plaintiff to the defendant, dated the 5th day of June 1813, and for all the land located upon the plats as the possession of the defendant.

The plaintiff, to prove his title to the tract called *The Brothers*, read in evidence to the jury the patent by which it was granted to *Thomas French*, on the 29th of November 1774; he then read a deed from *James Clarke* to *Abraham Faw*, for this land, dated the 7th of November 1785, and a deed from *Faw* to the lessor of the plaintiff for the same land, dated the 4th of September 1810. Both the deeds from *Clarke* to *Faw*, and from *Faw* to the lessor of the plaintiff, contain recitals, stating that a deed for this land was passed by *Thomas French*, the patentee, to *James Clarke*, on the 23d of October 1779. This deed, however, was not produced, and evidence was given that no such deed could be found among the records. He also gave parol evidence, (*Wiley, Fisher, Simkins, and M. Mahon.*) to prove that *James Clarke* claimed the land called *The Brothers*, and exercised acts of ownership over it in the year 1782, and afterwards. That a tenant under him held

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possession of part of the land, and cleared it. That the lessor of the plaintiff, and those claiming under him, have been in *actual* possession of parts of this land since the year 1792. That he made an addition to the Town of *Cumberland* more than 26 years before the institution of this suit, by selling out lots to different persons, from *The Brothers*, (claiming the whole tract under *Abraham Faw*,) the possession of which lots has never been disturbed. That in 1799, this land was assessed to *Faw*, and the taxes were paid by the lessor of the plaintiff. The defendant then offered evidence to show, he had been in possession of part of *The Brothers* for many years, claiming the same *not as part of The Brothers*, but as being included within the lines of other tracts of land, to which he was entitled. The counsel for the plaintiff then prayed the court to instruct the jury, if they believed the evidence given on the part of the plaintiff and defendant, they may presume a deed from *Thomas French*, the patentee, to *James Clarke*, for *The Brothers*, before the 7th day of November 1785; which instruction the court refused to give.

If all the testimony submitted to the jury was legal evidence, and the possession of the defendant was not a mixed or conflicting possession, so as to affect the title of *The Brothers*, it is difficult to imagine a case that would afford a stronger foundation to presume a deed. The court below have not stated the ground upon which they rejected the prayer, but it is contended here, by the counsel for the appellee, in defence of their opinion, that there was a mixed possession of *The Brothers* by the lessor of the plaintiff and the defendant, and therefore a deed should not be presumed on the possession of *either* against the other; and, although the deeds from *Clarke* to *Faw*, and from *Faw* to the lessor of the plaintiff, were permitted to be read in evidence to the jury, they were not *legal* evidence, and therefore ought to be rejected by this court, and without their aid, there was not a sufficient foundation to presume the deed.

If there had been a mixed possession by plaintiff and defendant, both claiming *under The Brothers*, we are not prepared to say the opinion of the court was erroneous, nor is it necessary to decide that question. But in this case it appears, that although the defendant was in possession of part of this land, he did not claim it as being part of *The*

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Brothers, but as being included within the lines of other tracts of land to which he was entitled, and whose location interfered with *The Brothers*. (See the testimony of *Roger Perry*, who was a witness produced by the defendant and his counsel in the cause.) His possession then did not conflict with the title of *The Brothers*, but with its location. He claimed, not as the proprietor of that land, but as the owner of other tracts, whose lines took away a part of it. He might rightfully hold all the land in his possession under the other tracts, although the plaintiff had a legal title to *The Brothers*. His possession does not affect the title to *The Brothers*, but its location only. When a mixed possession can be used, to prevent the presumption of a deed, that possession must be held by both parties, claiming title to the same land.

It has been urged that the deeds from *Clarke* to *Faw*, and from *Faw* to the lessor of the plaintiff, were not legal evidence, and ought to be rejected by this court. The examination of this part of the case presents two questions, 1st. Were those deeds, or either of them, legal evidence? 2d. If they, or either of them, are to be rejected, was there sufficient evidence, without the aid of the rejected deed, to support the prayer made by the counsel for the plaintiff?

The opinion of the court on the first bill of exceptions, is conclusive upon the deed of *Faw* to the lessor of the plaintiff. *Faw* was a nonresident of the state, and the deed was acknowledged by letter of attorney; the acknowledgment was made before two justices of the peace of *Allegany* county, and the letter of attorney was proved before one justice of the peace for *Montgomery* county, and before the mayor of *Alexandria*. Neither of them had authority to take such probate, and therefore the letter of attorney was not well and sufficiently proved. The deed from *Clarke* to *Faw* is not liable to the same objection—*Clarke* resided in *Baltimore* county, and the acknowledgment was made by him before *Isaac Vn. Bibber* and *Thomas Russell*, who state themselves to be two justices of the peace for that county; the certificate of the clerk of *Baltimore* county is in the following words: “I hereby certify, that *Isaac Vn. Bibber* and *Thomas Russell*, gentlemen, before whom the above acknowledgment was made, and who have thereunto subscribed their names,

were at the day of the date thereof, and still are, two justices of the peace for the county aforesaid, and to all certificates by them given, *as such*, due faith and credit is and ought to be given, as well in courts of justice as thereout." It is objected that this certificate is not sufficient, because it does not state the justices were *duly commissioned and sworn*. It has been decided in the second trial of *Gittings and Hall* in 1809, that these particular words are not necessary to constitute a good certificate. The words there were "*legally authorised and assigned*, and due faith and credit ought to be given to their certificates." Chief Justice Chase says, "the clerk is the person intrusted to make the certificate—he had knowledge of the facts whereon to ground his certificate, which is to authorise the recording the deed. The court think a substantial compliance with the directions of the act is all that is requisite, and the court consider the words of that import. The words *legally authorised* are of the same import as *duly commissioned and sworn*. The court consider that the justices could not be legally authorised unless they had been commissioned and sworn." In that case there were auxiliary words, not to be found in this—*legally authorised and assigned*—and the court rely on those words, not because there is any magic in them, but because they import that the justices must have been commissioned and sworn, and are therefore a substantial compliance with the act. Any other words then, which necessarily import that they were commissioned and sworn, would be as substantial compliance with the act, as legally authorised and assigned. But independent of that decision, and if the question was now for the first time before us, we think justice ought not to be perverted, and the estates of third persons defeated, by a mere clerical error in the literal observance of a form. Where the law requires the clerk to give a certificate, and he substantially complies with it, it is sufficient. This certificate states "they were justices of the peace, and that due faith and credit is and ought to be given, as well in courts of justice as thereout, to all certificates given by them *as justices*." Now what is the irresistible import of those words? If they were justices of the peace, they must have been duly commissioned, for unless duly commissioned they could not be justices; and due faith and credit ought to be given to their certifi-

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ates *as justices*, they must have been sworn, for they are not authorised to give certificates *as justices* unless they had been sworn. We consider this certificate a substantial compliance with the act, and the deed was proper evidence to be submitted to the jury.

Was there then sufficient evidence to justify the prayer of the counsel for the plaintiff, if we retain the deed from *Clarke* to *Faw*, and reject that from *Faw* to the lessor of the plaintiff? *The Brothers* was patented to *French* in 1774. In 1782, although then a great part was in woods, we find it in the possession of *Clarke*, by his tenant claiming it as his property, and exercising acts of ownership over it. In 1785 it is conveyed by *Clarke* to *Faw*, who stands assessed for it in 1799. The taxes are paid by the lessor of the plaintiff, who continues in the possession of the land, claiming it, as some of the witnesses declare, under *Faw*, from the year 1792. He adds to the town of *Cumberland*, by laying out lots from this land—he sells, leases, and disposes of those lots at his pleasure, and the possession of them remains undisturbed; and during the whole of this period, from the first possession by *Clarke*, no person set up an adversary claim to it. We think this testimony afforded a sufficient foundation to presume the deed, and that the court ought so to have instructed the jury.

We concur in opinion with the court below, on the *first*, *second*, and *third* exceptions, and reverse the judgment on the *fourth*.

ARCHER, J. The question arising on the *first* bill of exceptions taken in this cause, is as to the admissibility in evidence of the deed from *George Mason*, the patentee of *Walnut Bottom*, to the lessor of the plaintiff, dated the 25th of October 1783. *Mason*, the grantor, at the time of the execution of the deed, resided in the state of *Virginia*, and on the same day executed a power of attorney to *Alexander Claggett*, and *Daniel Cresap*, junior, empowering them, or either of them, to acknowledge the deed in his name, in conformity with the act of assembly providing for the acknowledgment of deeds in cases where the grantors resided out of the state. One of the attesting witnesses to the power of attorney appeared before *Richard Thompson*, in *Montgomery* county, and made oath to the

due execution of the power, which is certified by the said *Thompson*. To this is annexed a certificate of the clerk of *Montgomery* county, that *Richard Thompson*, at the time when the said proof was made, was a justice of the peace of *Montgomery* county, duly authorised and assigned. It further appears, that the land intended to be conveyed by said deed, lay in *Washington* county, and was, by *Alexander Claggett*, one of the attornies, on the 8th day of Nov. 1783, acknowledged before two justices of the peace for *Washington* county, and recorded within the time prescribed by law. Evidence was also given on the part of the plaintiff of his full and undisturbed enjoyment and possession of the land described in the deed from the date thereof to the institution of this suit, a period of thirty years.

Two questions have been discussed in the investigation of this subject.

1st. Whether the power of attorney is well and sufficiently proved in conformity with the act of 1766, *ch. 14*? And

2dly. Whether presumption, from length of possession, can be called in aid of the defect, if one exist?

It has been urged by the counsel for the defendant, that the power of attorney must be proved either before the justices who take the acknowledgment, or before some justice of the county where the land lies. To give the construction to the act, first contended for, would violate every rule of interpretation. It was obviously the intention of the legislature to designate alone where deeds should be acknowledged, and where recorded, and not to limit the place where, or the persons before whom the proof should be made. It was further the intention of the legislature, in their enactment of the *fourth* section of the law of 1766, *ch. 14*, to facilitate the means by which nonresidents might transfer their lands, and to obviate the difficulties which existed in the transfer of landed property in cases not provided for by the act of 1715. Viewing it in this light, the most liberal construction, to effectuate the object of the legislature, should be given to the section. To confine the proof of the power to the county where the land lies would, if it did not multiply difficulties to the nonresident grantor in the transfer of his landed property, at least leave him where it found him. It certainly would be wholly im-

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material where the proof was made, provided it was made before any person having power by law to administer an oath. The object of the legislature, in requiring proof of the power, was certainly salutary, but why should we confine the proof to be made in the county where the land lies, when by so doing no object, beneficial to the parties, could be attained, and a strained construction would have to be given to the law, and when this strained construction would involve the legislature in the just imputation of this absurdity, that they considered an oath more obligatory when made in one place than another.

The affidavit made by the subscribing witness to the power, has been considered as *entirely voluntary*, inasmuch as it was made out of the county where the land lies; but this presupposes the fact, that either the proof was not required to be made, or that the justice of *Montgomery* had no power to administer the oath, both of which propositions are considered equally groundless. It has also been urged, that the justice possessed neither a special or general jurisdiction, as it regards the administration of oaths in proof of the power. I consider the act of 1766 as requiring the proof, and not designating before whom it shall be taken. In such a case there is certainly a power impliedly granted to *all* justices of the peace, and other judicial officers, to take the proof required. If it be once admitted that the proof is not limited to be taken in the county by the act of assembly, and surely such is the only rational construction, it would seem necessarily to follow, that justices of the peace any where could take the proof, otherwise the act would in this respect be nugatory.

If then the justice had the power to take the proof, does it sufficiently appear to the court that he was a justice of the peace of *Montgomery* county? The only evidence of this is the certificate of the clerk of that county, and this, it has been urged, is insufficient, no act of assembly expressly warranting a certificate to be given in this particular case. The original commissions to all justices of the peace are transmitted to the respective counties for which they are appointed. They are required to assemble at the respective court-houses to take the oaths required by the constitution and the laws, one of which oaths, at least, is, by the act of 1777, required to be recorded. By whom then could their appointment and qualification be attested.

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but by the officer having charge of their commissions, and the evidence on record of their qualifications? Such evidence is certainly admitted in analogous cases, by express legislation. But I consider the admissibility of this evidence as settled by the decision of this court, in the case of *McComas vs. Bradford's Lessee*. This cause was tried in *Harford* county court, and was brought up by appeal to this court. A copy of a lease from the agent of the Lord Proprietary, for 99 years, dated in 1744, was offered in evidence. It was proved by the affidavit of the auditor of the state, in whose office the original was deposited, to be a true copy. The affidavit was taken in *Anne Arundel* county before a justice of the peace, with a certificate of the clerk of that county annexed, that the person, before whom the affidavit was taken, was duly commissioned and sworn. This court, at December term 1813, decided that the copy was competent evidence. It will be perceived by a reference to the act of assembly of 1793; *ch. 103*, that copies of the books and papers in the auditor's office, attested by that officer, *and sworn* to by him to be true, copies were made evidence, in the same manner as if the original were produced. That case, and the present, have but one feature by which they can be distinguished. The act of 1766, I have endeavoured to show, made no designation of the officer before whom the proof should be made. The act of 1793 directed generally that the auditor should be sworn, without saying before whom, and in each case the oath is made in a different county from that in which the papers are adduced in evidence. In neither case is there any evidence to satisfy the mind, that the oath was taken before a person empowered by law to administer oaths, except the certificate of the clerk of the county where the justice resided. The feature before alluded to, which distinguishes the two cases, is that in one certificate the justice is said to be duly *commissioned and sworn*, and in the other that he was *authorised and assigned*. Since the determination in the case of *Gittings and Hall*, the expression in either certificate is sufficient, the words being considered equivalent. No other reason can be given for the determination of the case of *McComas and Bradford's Lessee*, than that this court considered the clerk's certificate was sufficient to prove that the person, before whom the oath was taken, was a justice of the peace; and governing in that case, it

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should govern in this. An adherence to decisions, (it can scarcely be necessary to observe,) is of great consequence to the public. It would be infinitely better to adhere to a determination, from which no possible inconvenience could flow, relative to the propriety of which a reasonable doubt might be entertained, than by rescinding it, to open a door to endless litigation. I cannot but think, that the giving efficacy to this deed is of great importance to the security of those land titles which are derived through nonresident grantors. These titles are undoubtedly numerous in the state. The cases of practice under this law, which have come under my observation, have generally been conducted by counsel, and in these the proof of the powers, and the acknowledgments of the deeds, have been made in the county courts where the lands lay. What has been the popular construction and practice with regard to it, I am unable to say, but doubtlessly this deed has many intimately allied to it in the mode of proof and manner of execution. Indeed this record furnishes us with two deeds precisely of the same character; from which a deduction may reasonably be drawn that they are more numerous than at first view might be imagined.

Believing the deed sufficient on the first ground, I do not think it necessary to make any remarks on the power, which it is urged the court would have; to call in to its support the aid of presumption. So far as regards the competency of the witnesses, whose testimony is detailed in the *second* and *third* bills of exceptions, I do not deem it necessary to express an opinion; I concur with the court below in rejecting the prayers made by the plaintiff. When all objections to the competency of the witnesses, and to their credibility, were withdrawn, the plaintiff could have had the benefit of their testimony if he had pleased, and the jury were surely bound to respect it. To call on the court, under these circumstances, for the expression of their opinion as to the competency of the witnesses, was asking the court, in effect, for a mere speculative opinion, which was properly refused.

The court below were called upon, in the *fourth* bill of exceptions, to direct the jury that they might presume a deed from *Thomas French*, the patentee of the tract of land called *The Brothers*, to *James Clarke*, before the 7th of November 1785, the date of his conveyance to *Fawcett*.

which conveyance recited that a deed had been made by the patentee to *Clarke*. Presumption is often resorted to for the purpose of supplying defective evidence, and in this country is not oftener applied to any subject than to supply defective title to lands. It would be difficult to make out the titles to many of the elder tracts of land in this state, by a regular deduction of title deeds from the patentees down to the present proprietors, without resorting in some stage of them to presumption. Records may sometimes be lost or destroyed. Ancient title papers may be defectively executed, or the proof of them, from lapse of time, may be impossible. Yet in all these cases the possession may have been invariably in the person claiming the land, and in those from whom he derives his title. In such cases possession, which has been long and undisturbed, and which is in general the concomitant of title, induces a belief in the mind, of title little short of that which would be produced by the adduction of the most undeniable and best authenticated evidences of right. The grant of incorporeal hereditaments is often presumed from the undisturbed user thereof for a length of time. Grants from the crown, in *England*, are presumed, from length of possession, and here even proprietary grants, under certain circumstances, are presumed. In general these presumptions are bottomed upon the existence of certain facts, which can leave but little doubt upon the mind of the truth of the fact which we are called upon to presume. They frequently too, derive their force and efficacy from that vigilance with which the law guards ancient possessions, which sooner than they should be disturbed, presumes that they had in contract a rightful commencement. In this case, however, it has been strongly urged, that the possession of the plaintiff was not of such a character that a presumption could justifiably be founded upon it, and that if it were of such a character, yet that it has been rebutted by an opposing possession of the defendant, which would preclude the idea that a conveyance had been made in conformity with the prayer.

In order to lay a ground for a presumption, it certainly would not be necessary that there should have been a possession by enclosure. Were this the case, presumption need never be called in aid of title, for the statute would protect the possession without it. If one have the right in a tract of land, and possession of part, his possession of a

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part is possession of the whole tract, according to the true position and location of the land. It appears from the evidence, in addition to the deeds which are contained in the record, and which were offered in evidence, that *Clarke* in the year 1782 leased the land to *Benjamin Wiley*, who lived on it eight or ten months; that in 1788 or 1789, *Wilkins* cleared a field on the land, and held it some years, always claiming title under the lessors of the plaintiff, from which period the lessor of the plaintiff, and those from whom he claimed, and under whom he claimed, have been in the actual possession and occupation of parts of the land, by cutting timber thereon, clearing land, leasing out and selling parts of it to different persons, always claiming title to the whole tract as having been purchased of *Faw*. It is unaccountable that the patentee, or his representatives, should have permitted *Clarke* to take possession of this tract of land, hold it in his possession for several years, place upon the records of the country a deed of conveyance for it, reciting too that the patentee had conveyed his title to him; that he should have permitted *Clarke* and his grantees, to remain in the quiet and undisturbed possession of this property for a period of thirty-one years, without making a single effort to dispossess them, unless we believe he had conveyed the lands. It is not pretended that any such effort ever was made on the part of the patentee. In the absence then, of such evidence, the conveyances executed by the persons in possession, the long and uninterrupted possession of *Clarke*, and those who claim under him, furnish evidence of a character sufficiently strong; upon which to build the presumption prayed for by the plaintiff's counsel in the court below. The testimony adduced by the defendant is not at all, in my apprehension, calculated to lessen the weight of those circumstances which naturally give rise to the idea of a conveyance having been made. The defendant has taken defence for *George's Adventure*, *Crooked Meanders*, and part of *Walnut Bottom*; whether this be from the casual interference of the lines of these tracts with *The Brothers*, or whether the tracts, when originally taken up, were laid altogether upon *The Brothers*, under the impression that it did not extend as far as now laid down, and claimed by the plaintiff, or that they were vacancies, are questions perhaps immaterial to the investigation and determination of this subject. The de-

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defendant, and those from whom he claims, have been in possession of three several parcels of the land for which he takes defence, one from 1795, another from 1797 or 1798, and the third from 1799 or 1800, but he has never claimed either as belonging to *The Brothers*, but sets up a right independent of that tract, and in no way, as to title, connected with it, always contending that the just location of the plaintiff's tract would not cover his lands. His claim and pretensions, his enjoyment and possession of these lands, are in no wise inconsistent with the plaintiff's right and title to *The Brothers*, or with any presumption, which may be made in aid of the plaintiff's defective title, except so far as by the proper location they may be found to interfere. There has been no mixed possession of the tract which the plaintiff claims, but the possession of each has been of separate and independent tracts of land, by different names and different grants. Each may have a perfect title in the several tracts which they claim, so far as grants and regular conveyances alone can confer a right; but which is to have the precedence may, nay must entirely depend on a question of location, which is a question of fact for a jury alone to determine. Presumption is a question of law, and if the defendant had been sufficiently long in the possession of those tracts, for which he takes defence, there could be nothing contradictory or inconsistent in allowing to each the benefit of presumption to supply defective title papers. In such a case the determination of the question of right would be made from the seniority of their respective grants, and their interfering locations, which would have to be adjusted by the judgment of a jury from the evidence each might adduce. I therefore think the plaintiff entitled to the direction he has asked in the *fourth* bill of exceptions.

It has, however, been strongly urged, that two of the deeds upon which the plaintiff grounds his evidence, upon which to make the presumption, are defective. I believe the deed from *Faw* to *Beall*, bearing date the 24th of September 1810, good and admissible evidence, for the reasons assigned in the consideration of the question arising on the *first* bill of exceptions. The other deed from *Clarke* to *Faw*, dated the 7th of November 1785, was acknowledged before two justices of *Baltimore* county, and the clerk of that county has certified that the persons before whom the acknowledgment was made were justices of the peace, and

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that to all their acts as such faith and credit ought to be given. The certificate alone is objected to, and it is said not to be in conformity with the *third* section of the act of 1766, *ch. 14*; that requires the certificate to state, that the persons before whom the acknowledgment was made were *justices of the peace, commissioned and sworn*. In the case of *Gittings & Hall*, it was determined that the words of the act need not be pursued, but that equivalent words would be sufficient. *Faith and credit could not be given to their acts* as justices of the peace, unless they were *commissioned and sworn*, and the assertion of the former in the clerk's certificate, necessarily implies the latter, and brings the certificate within the decision in the case above alluded to. It is therefore considered, that the deeds objected to are admissible in evidence, and can form no ground to support the refusal of the court below to grant the prayer of the plaintiff.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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D, by his will, devised as follows:

Item. I give and bequeath all that my land or messuage, with the appurtenances whereon I now

dwell, called W, also all that tract of land called F, adjoining thereto, to my loving son W, to hold to him, during his natural life, and from and after his decease, I give all the said messuage, lands and tenements, to my dear grandson C, eldest son of the said W, and from and after the decease of my said grandson C, then to remain to the first son of my said

grandson, and the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth and fifth, and all and every other sons of my said grandson C, to be lawfully begotten, the elder of such son or sons, and the heirs of his body lawfully issuing, always to be preferred, and to take before the younger of such sons, and the heirs of his body, and for default of such issue, then I give the same to my grandson T, second son of the said W, for and during the term of his natural life, and after his decease, to remain to his issue in tail, in such manner as I have limited the same to my grandson C, and his issue: and for default of such issue, then to remain to my grandson G, third son of the said W, for and during the term of his natural life, and after his decease, to be and remain to his issue in tail, in the same manner as before limited for the issue of my grandson C; and for default of such issue, then to remain to my own right heirs forever."—Held, that T took only an estate for life in the premises devised to him.

The rule in *Shelley's* case is equally applicable to limitations in wills as in deeds.

The word *issue* in a will is sometimes a word of limitation, and sometimes of purchase, according to the context of the devise.

APPEAL from *Prince-George's* county court, from a *pro forma* judgment rendered in favour of the plaintiff, from which the defendant appealed to this court. It was an action of ejectment for a tract of land called *Frankland*. A statement of facts was agreed to, in which many things were stated which are unnecessary to be mentioned here, as the question turned wholly on the devises in the will of *Charles Digges*, dated, the 28th of January 1741. The devises are as follows, viz. "Item. I give and bequeath all that my land or messuage, with the appurtenances whereon I now dwell, called *Warburton Manor*, as also all that tract of land called *Frankland*, adjoining thereto, to my loving son *William Digges*, to hold to him during his na-

ture of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth and fifth, and all and every other sons of my said grandson C, to be lawfully begotten, the elder of such son or sons, and the heirs of his body lawfully issuing, always to be preferred, and to take before the younger of such sons, and the heirs of his body, and for default of such issue, then I give the same to my grandson T, second son of the said W, for and during the term of his natural life, and after his decease, to remain to his issue in tail, in such manner as I have limited the same to my grandson C, and his issue: and for default of such issue, then to remain to my grandson G, third son of the said W, for and during the term of his natural life, and after his decease, to be and remain to his issue in tail, in the same manner as before limited for the issue of my grandson C; and for default of such issue, then to remain to my own right heirs forever."—Held, that T took only an estate for life in the premises devised to him.

The rule in *Shelley's* case is equally applicable to limitations in wills as in deeds.

The word *issue* in a will is sometimes a word of limitation, and sometimes of purchase, according to the context of the devise.

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tural life, and from and after his decease, I give all the said messuage, lands and tenements, to my dear grandson *Charles Digges*, eldest son of the said *William Digges*, and from and after the decease of my said grandson *Charles*, then to remain to the first son of my grandson, and the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth and fifth, and all and every other sons of my said grandson *Charles*, to be lawfully begotten, the elder of such son or sons, and the heirs of his body lawfully issuing, always to be preferred, and to take before the younger of such sons, and the heirs of his body; and for default of such issue, then I give the same to my grandson *Thomas*, second son of the said *William Digges*, for and during the term of his natural life, and after his decease to remain to his issue, in tail, in such manner as I have limited the same to my grandson *Charles*, and his issue; and for default of such issue, then to remain to my grandson *George*, third son of the said *William Digges*, for and during the term of his natural life, and after his decease to be and remain to his issue, in tail, in the same manner as before limited, for the issue of my grandson *Charles*; and for default of such issue, then to remain to my own right heirs for ever." The testator died about the month of May 1744, and after his death his eldest son *William Digges*, entered upon and was seized of the land in the declaration mentioned, claiming and holding the same under the foregoing clause in the will of his father. He continued seized, holding and claiming the same under the said will, and without making any disposition thereof till his death, which happened about the year 1783. After the death of *William Digges*, his son *Charles*, mentioned in the will aforesaid, having died in the year 1769, *Thomas A. Digges*, in the said will named, and second grandson of the testator, entered upon the said lands, claiming and holding the same under the said will; and being seized thereof, he the said *Thomas A. Digges*, on the 25th of May 1803, by his deed of bargain and sale, conveyed the land in question to *Thomas Harris*, who on the same day reconveyed to the said *Thomas A. Digges*, by deeds duly executed, acknowledged and recorded. *Thomas A. Digges* afterwards, on the 9th of July 1806, duly executed and acknowledged a deed to *William Lyles*,

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which was duly recorded, conveying to him part of the tract of land called *Franklin*, for which this action was brought. It was admitted that the defendant acquired the legal title to whatever estate in said land was conveyed to the grantee in the said last deed, by the will of *William Lyles*, dated the 26th of August 1800. The defendant, and those under whom he claims, have been in the seizin and possession of this land ever since the execution of the said deed. *Thomas A. Digges* died in December 1821, without having had any issue. *George Digges*, third son of the testator's son *William*, and who is named in the clause of the said will herein before set forth, died before the said *Thomas A. Digges*, leaving issue the lessor of the plaintiff, his only son and heir male, who claims the premises in the declaration mentioned, under the devise aforesaid in the will of the before named *Charles Digges*. Lease, entry and ouster, were admitted.

The cause was argued in this court before BUCHANAN, Ch. J. EARLE, MARTIN, STEPHEN, and ARCHER, J.

Magruder and *F. S. Key*, for the Appellant, contended, that under the will of *Charles Digges*, his grandson *Thomas* took an estate tail, which was destroyed by his deed to *Harris*. They cited and relied on the rule in *Shelley's* case, 1 *Coke* 93, 104. 1 *Fearne on Cont. Rem.* 170, 191 to 196, 198 to 201. *Thomas's Coke Litt.* 150, 378. 2 *Blk. Com.* 173. *Preston on Estates*, 271 to 275, 283, 381, 383, 359, 362, 263. *Coll. Jurid.* 221. 4 *Cruise's Dig.* 299. *Backhouse vs. Wells*, 1 *Eq. Ca. Ab.* 184, pl. 27. *Dodson vs. Grew*, 2 *Wils.* 322. *Robinson vs. Robinson*, 1 *Burr.* 38. *Legat vs. Sewell*, 1 *Eq. Ca. Ab.* 395. *Jones vs. Morgan*, 1 *Brown's Chan. Rep.* 206. *Lungley vs. Baldwin*, 1 *Eq. Ca. Ab.* 185. *Attorney General vs. Sutton*, 1 *P. Wms.* 57. *Archer's case*, 1 *Coke*, 66. *Lowe vs. Davies*, 2 *Ld. Raym.* 1561. *Hopkins vs. Hopkins*, 1 *Vez.* 268, *S. C.* 1 *Atk.* 581. *Goodlittle, dem. Sweet vs. Herring*, 1 *East*, 264. *Lisle vs. Grey*, *Sir T. Raym.* 278, 302. 315. *Doe vs. Applin*, 4 *T. R.* 82. *Goodright vs. Pullyn*, 2 *Ld. Raym.* 1438. *Doe vs. Cooper*, 1 *East*, 229. *Pratt's Lessee vs. Flamer*, 5 *Harr. & Johns.* 10. *Sayer vs. Masterman*, *Ambl.* 344. *Poole vs. Poole*, 3 *Bos. & Pull.* 620. *Denn vs. Puckey*, 5 *T. R.* 299, 305. *Cory*

ton vs. Helyar, 2 Cox, 340; and *Wykham vs. Wykham*, 18 Ves. 420.

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Jones, Taney and Marshall, for the Appellee, referred also to the cases cited by the appellant's counsel, and to 2 Inst. 110, 112. 2 Blk. Com. 116, 117. *Fearne* 148, 154, 155, 152, 153, 194, 192, 150, 149, 196, 197, 90. *Preston*, 295, 266, 379, 380, 381. *Harg. L. T.* 506. *Doe vs. Laming*, 2 Burr. 1100. *Doe vs. Collis*, 4 T. R. 294. *Lodington vs. Kime*, 1 Salk. 224. *Doe vs. Perryn*, 3 T. R. 484. *Doe vs. Mulgrave*, 5 T. R. 320. *Bamfield vs. Popham*, 1 P. Wms. 54. *Foster vs. Romney*, 11 East, 603, (note.) *Hay vs. Coventry*, 3 T. R. 86; and 4 Cruise, 298 to 300.

BUCHANAN, Ch. J. delivered the opinion of the court. This case depends upon the construction of the will of *Charles Digges*, dated the 28th of January 1742, which *inter alia* has the following devise: “*Item*, I give and bequeath all that my land or messuage, with the appurtenances whereon I now dwell, called *Warburton Manor*, as also all that tract of land called *Frankland*, adjoining thereto, to my loving son *William Digges*, to hold to him during his natural life; and from and after his decease, I give all the said messuage, lands and tenements, to my dear grandson *Charles Digges*, eldest son of the said *William Digges*, and from and after the decease of my said grandson *Charles*, then to remain to the first son of my said grandson, and the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth and fifth, and all and every other sons of my said grandson *Charles*, to be lawfully begotten, the elder of such son or sons, and the heirs of his body lawfully issuing, always to be preferred, and to take before the younger of such sons, and the heirs of his body, and for default of such issue, then I give the same to my grandson *Thomas*, second son of the said *William Digges*, for and during the term of his natural life, and after his decease, to remain to his issue in tail, in such manner as I have limited the same to my grandson *Charles*, and his issue; and for default of such issue, then to remain to my grandson *George*, third son of the said *William Digges*, for and during the term of his natural life, and after his decease, to be and remain to his issue in tail, in the same manner as before limited, for the

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use of my grandson *Charles*; and for default of such issue, then to remain to my own right heirs for ever." And the question is, whether *Thomas Digges* took an estate for life only, or an estate tail? In the exposition of wills, it is a general rule, that the intention of a testator expressed in his will, shall prevail, if consistent with the settled rules of law.

For the appellant it is contended, that the devise to *Thomas Digges*, &c. is within the rule laid down in *Shelley's* case, "that where the ancestor takes an estate of freehold by any gift or conveyance, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee, or in tail, the word heirs is a word of limitation of the estate, and not a word of purchase," which as a known and established rule of law controls and governs it, and that he took an estate tail.

The first inquiry to be made is, how the devise to *Thomas Digges* should be construed in relation to the previous devise to *Charles Digges*? that is, whether it is to be taken as an entirely unconnected disposition, to be construed alone, without reference to any other, the words to "remain to his issue in tail," denoting not only the estate intended to be passed, but the manner also in which it should pass, and the subsequent words "in such manner as I have limited the same to my grandson *Charles* and his issue," as explanatory only of the previous limitations to *Charles* and his heirs. And it seems to be perfectly clear, that the latter words were introduced by way of reference to the limitation to *Charles Digges*, and his sons; for the meaning of the testator, in the use of the words, "to remain to his issue in tail," after the limitation to *Thomas Digges* for life; and construed, as it should be with that reference, the whole clause must be understood, as if in place of the words "his issue in tail," the words of the preceding limitations to *Charles Digges*, and his first and other sons, &c. were particularly repeated, which is at variance with no known principle of construction. On the contrary, it is a rule in the interpretation of wills, that the whole of the instrument shall be taken and examined together, in order to arrive at the intention of the testator, which shall prevail if there be apt words to effectuate it; and it is settled that even the technical word "heirs" may by reference to a preceding distinct limitation, be qualified

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and restrained to mean "sons." The words "in such manner as I have limited the same to my grandson *Charles*, and his issue," are manifestly words of relation, and mean "to the first son of *Thomas*," &c. and so on, as in the words of the limitations, to the first and other sons of *Charles*, the word "issue" there used being, by reference, synonymous to sons; and whatever estate *Charles Digges* took, whether in tail, or for life only, the same estate was given to *Thomas*. What estate then did *Charles Digges* take under the will of his grandfather? Admitting the rule in *Shelley's* case, though in terms applied to conveyances by deed, to be equally applicable to limitations in wills, as it certainly is, it remains to be seen whether this case is within that rule.

To bring it within the rule, the word "issue," "for default of such issue," is resorted to to explain the sense in which the word "son" is used, as a word of more extensive signification, and is relied upon as being synonymous to the word heirs. That word, in the place where it is first found, immediately following the limitation to the first son of *Charles Digges*, and the heirs of his body, is used in relation to the heirs of the body of that son, and by force of the relative word such, is to be understood to mean "heirs;" that is, the heirs of the body of the first son of *Charles*, which surely can have no effect upon the sense in which the words "first son" are used. Or if it should be construed to relate to the first son of *Charles*, as well as to the heirs of the body of such first son, still it would be restrained by the same relative term "such," to mean "son." And the same word afterwards used, and explained by the accompanying word "such," relates to, and is restrained to mean the first and other sons of *Charles Digges*, and the heirs of the bodies of such sons respectively; but if it were not so, it by no means follows that the word "issue" would have the effect to bring this case within the rule in *Shelley's* case, being sometimes a word of limitation, and sometimes of purchase, in a will, according to the context, and to borrow the language of Mr. *Fearne*, "of less technical force" than the word "heirs" in the plural number, and is not *ex vi termini* within the rule.

It is not, however, our purpose to inquire minutely to what cases the rule is, or is not applicable, that would lead to an almost endless examination; but briefly whether this

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particular case is within it. And in order to arrive at a correct conclusion; it would seem to be only necessary to look to the leading principle of the rule; which is, that the limitation must not be to an individual or individuals of the family of the person to whom the life estate is given, as a son, sons or children, but must be to his heirs, general or special, and so extend to and comprise the whole line of described heirs, *as a class or denomination of persons to take in succession*, as that the person who takes after the tenant for life, whoever he may be, must be one who indiscriminately answers the relative description of heir general or special, (as the case may be,) of the ancestor referred to, and takes *eo nomine*, or technically in that character only; and that, there must be nothing in the limitation to restrain the operation of it *to the person so first taking, or his representatives as such*, but that it must reach to, *and equally comprehend all other persons successively answering the same relative description*, and entitle them to take under it *eo nomine* and by virtue only of such relation to the ancestor. *Doe vs. Colyear*, 11 East, 564. *Preston on Estates*, ch. 3. *Fearne on Remainders*, sec. 5. As in the particular case of *Shelley*, where the limitation was "to *Edward Shelley* for the term of his life, without impeachment of waste; and after his decease to the use of *Mr. Caril* and others, for 24 years; and after the said 24 years ended, then to the use of the heirs males of the body of the said *Edward Shelley* lawfully begotten; and of the heirs males of the body of such heirs males lawfully begotten; and for default," &c.

There the limitation to the use of the heirs male of the body of *Edward Shelley* lawfully begotten, not being confined to one or more persons, in whom the character of heirs should first be fulfilled, but embracing all possible heirs of the given description, as a class of persons to take successively, and in that character only, *Edward Shelley* was held to take an estate tail, notwithstanding the super-added words of limitation "to the heirs males of the body of such heirs males lawfully begotten," &c. they being of the same import with the preceding words of limitation, and virtually included in them, and not inconsistent with the nature of the descent pointed out by them.

But if they had provided a different order of succession from that described by the first limitation: "to the use of

the heirs males of the body of *Edward Shelley* lawfully begotten," and could not have been construed to mean the heirs in succession of the first named heirs, as heirs of *Edward Shelley*, then *Edward Shelley* would have taken an estate for life only. As in the case put by *Anderson* in *Shelley's* case of a limitation to the use of A for life, remainder to the use of his heirs, and of their heirs female; the superadded words of limitation, "and of their heirs female," denoting a different species of heirs from that described by the preceding words "his heirs," the one being a limitation in fee simple, and the other in tail female; the superadded words of limitation, in such a case, manifesting the intention of the testator, that the first taker should only have an estate for life, and that the words "his heirs," were only used to designate those who should form the root of a new inheritance.

Where there is a limitation to an individual or individuals of the family of the first taker, as to a son, sons or children, with superadded words of limitation to his or their heirs in fee or in tail, such selection being a manifestation of the testator's intention to constitute the person or persons selected, a stock from which the inheritance shall be deduced, there can be no doubt that the ancestor referred to, will take an estate for life only, notwithstanding the person or persons so selected may also fill the character of heir or heirs to such ancestor; as in the case of a limitation in strict settlement on first and other sons.

In *Lisle vs. Grey*, Sir T. Raym. Rep. 278, *Fearne on Rem.* 151, the covenantor covenanted to stand seized to the use of himself for life, and after his decease, to the use of E, his son, for life, and after his decease, to the use of the first son of the body of E, and the heirs male of the body of such first son; and for default of such issue, to the use of the second son of the body of E, and the heirs male of the body of such second son; and for default of such issue, to the use of the third son of the body of E, and the heirs male of such third son; and for default of such issue, to the use of the fourth son of the body of E, and the heirs male of the body of such fourth son; and so severally and respectively to every of the heirs male of the body of the said E, and the heirs male of the bodies of such heirs male according to their ages and seniorities; and for default of such issue, remainder, &c. and it was held, that the words "and so," &c. were words of relation, and meant in the

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same manner as the four first sons took, and that E took only an estate for life, the general import of the word heirs being qualified by the preceding particular limitations to the first and other sons. And thus construed, it stood as if it had been in terms a limitation to E for life, remainder to his first, second, and other sons, and the heirs male of the bodies of such sons respectively. In *Lowe vs. Davies*, 2 *Ld. Raym.* 1561, the devise was "to B, and his heirs lawfully to be begotten; that is to say, to his first, second and third, and every son and sons successively, lawfully to be begotten of the body of said B, and the heirs of the body of such first, second, third, and every other son and sons successively, lawfully issuing, as they should be in seniority of age and priority of birth, the eldest always, and the heirs of his body, to be preferred before the youngest, and the heirs of his body; and in default of such issue then over," &c. In that case the words "his heirs" were considered as being explained by the words "that is to say," to mean first, second, and other sons, &c. And it was decided that B took only an estate for life, that being the manifest intention of the testator. In *Sweet vs. Herring*, 11 *East*, 264, the devise was to *Margaret Davie* for life, and after her decease to the heirs male of her body to be begotten, severally, successively and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, the elder of such sons, and the heirs male of his body lawfully issuing, being always preferred, and to take before the younger of such son and sons, and the heirs male of his and their bodies; and for want and in default of such issue, then over," &c. There it was held, that the words "heirs of her body," were not used in their strict technical sense as words of limitation, but were explained and qualified by the subsequent words "the elder of such sons," by which they were plainly designated by the deviser as purchasers to take in their own right, and not by descent from their mother; and thus explained, the whole clause was viewed as if it had been a devise to her for life, and after her decease to her first and other sons successively in tail, male.

Now what is this case? Why a devise to *Charles Digges*, and after his decease to his first, second, and third sons in succession, and the heirs of their bodies respectively, in no respect differing in principle from either of the

cases cited. In each of those cases, to be sure, the word "heirs" is used, which, if unexplained by the context, would have been a word of limitation, and have operated to give to the first taker an estate tail; but here is not that word, and this case is clear even of that difficulty, and which was the only difficulty raised in either of them; the case of *Bamfield vs. Popham* 1 R. Williams, 54, is directly in point. But here the words "for default of such issue," are relied upon as controlling the sense in which the word "son" is used, and explaining it to mean "issue." I have endeavoured to show, that they have no such operation, and it will be seen, that in *Liste vs. Grey*, and *Sweet vs. Herring*, the very same words are used, though no such effect was attempted to be ascribed to them. But if the word "son" was not in this devise, and in the place of it the word "issue" had in fact been used, it would have made no difference.

In *Backhouse vs. Wells*, 1 Cases in Equity Abridged, 184, pl. 27, the devise was to one for life, and after his decease to the issue male of his body, and to the heirs male of the bodies of such issue, and the first taker was held to have only an estate for life, the word "issue" not being *ex vi termini* a word of limitation, and the words of limitation grafted upon it, as in this case, showing that it was used as a word of purchase, and as descriptive of the person who was to take the estate tail. In the case of *Check vs. Day*, 2 Roll. Ab. 417, where the devise was to a woman for life, and after her death, to her heir, and the heirs of such heir, it was held that she took only an estate for life. And so in *Archer's* case, 1 Coke, 63, where the limitation was to one for life, and after his death to his next heir male, and the heirs male of the body of such next heir male. In both of those cases the word "heir" being used in the singular number, the superadded words of limitation restrained it to a word of purchase, which is stronger than the case of a limitation to one, and after his death to his "issue," and the heirs of such "issue." The case of *Legate vs. Sewell*, 1 P. Wms. 87, 1 Cases in Equity Abridged, 395, has been urged to show, that sons taking by seniority, and in succession, may still take as heirs; but that case will be found to have no bearing on this. There the devise was "to William Legate for life, and after his decease, to the heirs male of his body lawfully to be begotten, and the

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heirs male of the body of every such heir male, severally and successively as they should be in priority of birth," &c. In that case the limitation was to the heirs male, &c. and though they were directed to take severally and successively, there was nothing explanatory of the words "heirs male of the body," and showing that the testator used them in any other than their technical sense; whereas in this case the limitation is to the first son, &c. and the word "heirs" never used. And in *Lisle vs. Grey*, *Lowe vs. Davies*, and *Sweet vs. Herring*, the sense in which the word "heirs" is used, is explained by the context, which shows the meaning annexed to it by the testator himself, and that he used it in the same sense as *first, &c. sons*. What has been said of the case of *Legate vs. Sewell*, may equally be said of *Jones vs. Morgan*, 1 *Brown's Chan. Rep.* 206, *Fearne*, 134, which was also relied on in argument. And the cases of *Langley vs. Baldwin*, 1 *Cases in Equity Abridged*, 185, and *The Attorney General vs. Sutton*, 1 *P. Wms.* 754, are not more applicable. In each of those cases, after a limitation to some only of the sons of the first taker successively in tail, there is a remainder over, on the death of the first taker without issue male of his body, which of itself was held to give him an estate tail. In *Robinson vs. Robinson*, 1 *Burr.* 38, and *Dodson vs. Grew*, 2 *Wils. Rep.* 324, it was held to be an estate tail in the first taker, in order to give effect to the manifest general and more weighty intention of the testator, which could not stand with the particular intention, and must have been sacrificed, if the minor particular intention had been gratified. And they were not decided on the ground that they were within the rule in *Shelley's* case, but on the *cy pres* doctrine, which has been carried quite far enough in another country. Here there is no general intention to be sacrificed at the shrine of a particular intent, and this case is clear of the principle governing that class of cases.

It was manifestly the intention of the testator to give to his grandson, *Charles Digges*, an estate for life, and no more. He begins with giving an estate for life to his son *William Digges*, the father of *Charles*; he next gives an estate for life to *Charles*, his grandson, and then goes on to limit an estate to the first, second, &c. and all and every other son of *Charles*, in succession, and the heirs of their bodies respectively. Now if it was not his intention that

the first and other sons of *Charles* should take the estate successively each in his own right, as the root of a new inheritance, and that *Charles* should take only an estate for life, why did he not follow the devise to *William Digges* for life, with a limitation to *Charles*, his son, in tail? This he has not done, and his avoiding to do it, clearly shows what his intention was. Besides, the limitation in tail general to the first and other sons in succession, of *Charles Digges*, is in exclusion of the daughters of *Charles*; whereas if he took an estate tail general, it might eventually go to his daughters, (if he had any,) as persons belonging to the class of described heirs, which was not the intention of the testator. He meant to give *Charles Digges* only an estate for life, otherwise, he would have grafted words of limitation on the devise to him, as he did immediately after on the limitation to his first son, &c. and that intention may be grafted without violating any positive rule of law.

That the words "to his issue in tail," in the devise to *Thomas Digges*, are controlled by the next following words, "in such manner as I have limited the same to my grandson *Charles*, and his issue," are explained to mean, to the first son, &c. of *Thomas*, as in the limitation to *Charles*, and his first and other sons, is a position fully sustained by the case of *Lisle vs. Grey*, where the words "and so severally and respectively to every the heirs male of the body of the said E," immediately after the limitations to the first, second, third, and fourth sons of the said E, and the heirs male of their bodies respectively, were held to be words of relation, and meant, in the same manner as the four first sons took, the words "and so" being the same as *codem modo*. We are therefore of opinion, that *Thomas Digges* took only an estate for life in the premises devised to him.

JUDGMENT AFFIRMED.

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The Mayor &c
vs
Moore & Johnson

THE MAYOR, &c. OF BALTIMORE, vs. MOORE & JOHNSON.

JUNE.

APPEAL from *Baltimore* county court. *Assumpsit* for money due for paying taxes, imposed upon the property of

have no power to tax any particular part of the city, for paying the streets, lanes and alleys, in such part, unless such paying is for the benefit of such part especially.

If the corporation, in the preamble to an ordinance to provide for the pavement of streets, states the object to be one of general benefit to the city, they cannot in the same ordinance tax exclusively the particular part of the city in which the streets are located.

If such an ordinance is passed without its stating what the object of the pavement is, the legal presumption is, that it is the special benefit of the part of the city where the streets are situated.

Under the 2nd
sect of the act of
1797, ch. 54, the
corporation of the
city of Baltimore

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the defendants, (the appellees.) They pleaded *non assumpsit*. At the trial the plaintiffs, (now appellants,) gave in evidence an act of assembly of this state, passed at November session 1796, *ch.* 68, entitled, "An act to erect *Baltimore-town*, in *Baltimore* county, into a city, and to incorporate the inhabitants thereof," and also another act of the general assembly aforesaid, passed at November session 1797, *ch.* 54, entitled, "A supplement to the act, entitled, An act to erect *Baltimore-town*, in *Baltimore* county, into a city, and to incorporate the inhabitants thereof." And also the following ordinances of the mayor and city council of *Baltimore*, to wit, "An ordinance, entitled, An ordinance to appoint city commissioners, and prescribing their duties; an ordinance, entitled, An ordinance directing the paving of a part of *Dulany-street*, in the city of *Baltimore*; and an ordinance, entitled, An ordinance for paving *Wilkes'-street*, *Washington-street*, *Castle-alley*, and *County-street*, within certain distances, and for other purposes, so as more effectually to preserve the navigation." And the plaintiffs further gave in evidence, certain paving tax warrants, signed *Henry Stouffer*, *James Martin*, and *Nathaniel Hynson*, the city commissioners for the year 1817, and approved by *George Stiles*, Esq. the mayor of the city of *Baltimore* for the year last aforesaid. And also gave in evidence, that the said paper writings are the warrants issued by the city commissioners, under the ordinances herein before mentioned. And further gave in evidence, that at the time of the passing the said ordinances, the said *Philip Moore*, one of the defendants, was, and ever since hath been seized in fee of one undivided moiety of certain lots of ground in the said warrants mentioned, which moiety had belonged to his deceased wife, as one of the heirs of *William Fell*, who was former owner, and died seized in fee of the whole of said lots; and that the said *Thomas Johnson*, the other defendant, at the time of the passing the ordinance aforesaid, did hold, and ever since hath held, as tenant by the courtesy, the other undivided moiety of the said lots, in right of his deceased wife, who was the other heir at law of said *Fell*; and that the amount of the said paving taxes, so charged upon the said lots of ground, so held by the said defendants, are as follow, to wit: On *Dulany-street* \$3500 28, on *Wilkes'-street* from *Market-street* to *Wash-*

ington-street, §969 56, on *Washington-street* §116 55, and on *Wilkes'-street* from *Washington-street* to *County-street*, §415 80. And the plaintiffs further gave in evidence, that the city commissioners, on the 26th day of June 1817, contracted for the paving *Dulany-street* between *Bond-street* and *Castle-alley*, and for placing kirk stones and flag or stepping stones thereon; and that on the 14th day of April 1817, they contracted for the paving of *Wilkes'-street* between *Market-street* and *Washington-street*, and placing kirk stones thereon; and also, that on the 21st day of July 1817, they contracted for the paving of *Washington-street* between *Fleet-street* and the north side of *Wilkes'-street*, and placing kirk and flag stones thereon; and also, that on the 26th October 1817, they contracted for the paving of *Wilkes'-street* from *Washington* to *County-street*, and placing kirk and flag stones thereon; all which contracts were made in the name and on behalf of the mayor and city council of *Baltimore*. And further gave in evidence, that *Dulany-street* from *Bond-street*, eastward to *Market-street*, was paved in the fall of the year 1817, for the paving of which part there is no charge or claim against the defendants, they having no property or lots on said part; that the paving of the residue of said street under said contract, was commenced in April 1818, and finished in the fall of that year; that the paving of *Wilkes'-street* between *Market* and *Washington-streets*, was begun and finished in the summer and fall of 1817; and that the paving of the other parts of the streets in said contracts mentioned, were begun in April or May 1818, and finished in that year; but that the same had been, in the year 1817, dug down and filled up in different parts, as the unevenness of the ground rendered necessary, preparatory to being paved under the said contracts. And the plaintiffs further gave in evidence, that the city commissioners caused that part of *Castle-alley*, mentioned in the ordinance last recited, to be paved according to said ordinance; and that the part of *County-street*, mentioned in the said ordinance was, at the time of the making the same, a small distance, not exceeding a hundred yards, out of the then limits of the city of *Baltimore*; and that before the passing of the ordinance aforesaid for paving *Dulany-street*, that part of said street, from *Castle-alley* eastward to the old city line, had been gravelled and put in good order by

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and at the expense of the *Baltimore* and *Havre-de-Grace* turnpike road company. The defendants gave in evidence the act of assembly of 1791, *ch.* 59; the act of 1816, *ch.* 218; and of 1817, *ch.* 148. And also gave evidence, that the mayor and city council of *Baltimore* have not by themselves, the city commissioners, or other agents, contracted for the paving of any other street, part of street or place directed by the said ordinances, other than those mentioned in the aforesaid contracts, and that the matters and work directed to be done by the said ordinances have not been otherwise or further executed than as set forth in said contracts, and herein before stated. And also gave evidence, that the ancient eastern boundary line of the city of *Baltimore*, called in the aforesaid ordinance the *Old City Line*, crosses *Dulany*-street about 200 feet eastward of *Castle*-alley, that said street has not been paved from said alley eastward to the said old city line. And also gave evidence, that the description or designation of persons in the said several warrants, as "*Fell's* heirs" or "*Fell's* h'rs." is meant and intended to designate and describe the heirs of the said *William Fell*, deceased, who was the owner, and died seized of the several lots of ground so designated in the said warrants; and that the said deceased wife of the said *Johnson*, mentioned in the plaintiffs' evidence, died intestate, leaving a son *William Fell Johnson*, and a daughter, *Ann Johnson*, her heirs at law, to whom her moiety in fee of said lots descended, and who are seized of the same in representation of their mother, as heirs of the said *William Fell*, and that they reside in *Baltimore* county. And they further offered evidence, that the several alterations, from the original manuscript of the said warrants, in the names or description of persons therein charged with the paving taxes aforesaid, by inserting in a different handwriting from the said originals, the names or words "*P. Moore* for *Fell's* heirs," "*Moore and Johnson* for *Fell's* heirs," whether connectedly or separately used and applied, were so written, altered and made, by the authority of the city commissioners at the time being, and done after the institution of this suit at the term previous to the trial thereof. And they further offered evidence, that the said city commissioners never did make return, under their hands and seals, or otherwise, to the register of the city, a certificate or other writing, of the pitching, levelling, or

grading of the said streets, or any of them, or cause the same to be done, and that the said several warrants were issued, and the paving aforesaid done, without the consent of the proprietors of a majority of the ground fronting on the said streets, or either of them, or the consent of the majority of the proprietors of ground fronting thereon, or on either of them; and that the said charge for paving said streets is made at the rate of nine cents for every square foot of pavement in said streets, in front of the lots or ground of individuals thereon, except the parts allotted for footways, which are paved at the expense of the owners of the lots fronting thereon, at what the work and materials may cost. The defendants then prayed the direction of the court to the jury, that the plaintiffs were not entitled to recover; which direction the court [*Hanson and Ward, A. J.*] gave. The plaintiffs excepted, and the verdict and judgment being against them, they appealed to this court.

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The cause was argued at the last June term, before BUCHANAN, Ch. J. EARLE, and MARTIN, J.

Taney and *Scott*, for the Appellants, contended—1. That the plaintiffs had the right to impose the taxes stated in the declaration and bill of exceptions.

2. That that right had been properly exercised.

3. That the action was properly brought, and that the plaintiffs were entitled to recover.

On the *first* and *second* points, they referred to the acts of assembly of 1796, *ch.* 63, and 1797, *ch.* 54, *s.* 2, and the several ordinances passed by the city council of *Baltimore* on the subject of paving streets, &c. *Mayor of London vs. Sory, Carthew*, 92. 6 *Bac. Ab.* tit. *Statute*, 381, 382, 384. *Fisher vs. Blight*, 2 *Cranch*, 386, 399. *Rea vs. Loxdale*, 1 *Burr.* 447. *Church vs. Crocker*, 3 *Mass. Rep.* 21. 1 *Bac. Ab.* tit. *By Laws*, 544. *Rea vs. Spencer*, 3 *Burr.* 1837. *Martin vs. Mansfield*, 3 *Mass. Rep.* 419. *McCulloh vs. Maryland*, 4 *Wheat.* 316.

On the *third* point, they referred to 1 *Esp. Dig.* 6, 7. 5 *Mass. Rep.* 325. *Tilden vs. Metcalf*, 2 *Day's Rep.* 259. *Beatty vs. Marine Insurance Company*, 2 *Johns. Rep.* 109.

Harper, R. Johnson, and *Howard*, contended, 1. The action had not been rightfully conceived.

2. The right to lay the tax was a special authority, and

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the corporation had no power to delegate the authority to the city commissioners.

3. The paving warrants being altered after the institution of this action, was fatal to the plaintiffs.

4. The warrant is made the contract.

5. The plaintiffs had no right to recover because the work had not been done.

On the *first* point they referred to the act of 1796, *ch. 68, s. 10. 1 Chitty's Plead. 339.*

On the *second*, to *Rex vs. Spencer, 3 Burr. 1837. Rex vs. Cutbush, 4 Burr. 2204. The King vs. Ginever, 6 T. R. 732. Rex vs. Croke, 1 Cowp. 26.*

Curia adv. vult.

BUCHANAN, Ch. J. at this term, delivered the judgment of the court. The decision of this case involves the construction of the second section of the act of 1797, *ch. 54*, a supplement to the act incorporating the city of *Baltimore*. That section of the act, after conferring upon the corporation full power and authority to enact and pass all ordinances necessary for paving and keeping in repair the streets, lanes and alleys, in the city of *Baltimore*, gives the further power "to tax any particular part or district of the city, for paving the streets, lanes or alleys therein, or for sinking wells, or erecting pumps, which may appear for the benefit of such particular part or district." The question arises upon this latter clause, which is, whether authority is given to the corporation to tax any particular part or district of the city for paving the streets, lanes or alleys therein, unless such paving shall appear to be for the benefit of that particular part or district; or whether the word "which" relates to wells or pumps only? And we think it extends as well to the paving the streets, lanes and alleys, as to the sinking of wells and erecting pumps. A general and unlimited paving power is before given to the corporation, and it is difficult to suppose that the legislature meant to authorise the imposition of a special tax, on any particular part of the city, for any paving which should not be, or appear to be, for the benefit of such part. Such a power might be attended with evil consequences, and, in many cases, work very great injustice. Where a street is directed to be paved for the benefit of a particular part or district of the city, it is perhaps proper that

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such part or district should be taxed for the purpose; but where the paving is for the general benefit, and not of the immediate district in which the street lies, it ought to be paid for out of the general fund; and there would be much injustice in imposing a special tax on the particular district for that object, which could not have been the intention of the legislature. And where a law is of doubtful construction, that interpretation should be given it, so far as it can be done, which is pregnant with the least mischief. This view of the second section of the supplement to the charter of the city of *Baltimore*, brings us to an examination of the two ordinances of the 10th of April 1817, on which this suit is founded. Each of these ordinances has a preamble setting out the purpose for which it was passed. The first, that for paving a part of *Dulany*-street, after reciting in the preamble that it is a public highway leading into the city, which ought to be kept in the most perfect state of repair, and good condition, but has become in many places dangerous to travellers passing in carriages after dark, and that there is an imperious necessity for having it paved, proceeds to direct the city commissioners to pave it, in order to remove those inconveniencies to travellers, and imposes a tax on that particular district of the city for that purpose. The title of the other is, "An ordinance for paving *Wilkes*'-street, *Washington*-street, *Castle*-alley and *County*-street, within certain distances, and for other purposes, so as more effectually to preserve the navigation." The preamble states the object to be the protection of the navigation from injury by the wash coming down the hills, and also to remove the injury and inconvenience experienced by many individuals from the same cause, and that no alternative presents itself, but the paving the streets mentioned, for which purpose a tax is imposed on the particular districts in which they lie.

If these ordinances were without preambles, though the paving directed to be done is nowhere said to be for the benefit of the particular parts or districts in which the streets lie, yet such an exercise of the special taxing power, in the absence of any thing to the contrary, would be taken to have been in pursuance of the authority conferred by the charter. The city council would be presumed not to have exceeded their powers, but to have imposed the tax, for that purpose only for which the charter authorises

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it to be imposed; and with no other guide the mind would come to the conclusion, that it did appear to them to be for the benefit of those particular districts, and it is not necessary that it should be expressly so stated.

But it is a settled principle, that in the exposition of statutes, every part should be taken into consideration, in order to arrive at the intention of the legislature, which, when it plainly appears, ought to prevail. It is also a general rule, that the preamble of a statute is a key to its construction, and should be resorted to, to unlock the mind of the makers, but not to restrain the general words of an enacting clause, which, understood according to their genuine and natural import, clearly and plainly express the meaning of the legislature. And the same general rules of construction are equally applicable to the ordinances of a corporation.

In the enacting clauses alone, of the ordinances under consideration, not a word is to be found expressive of the opinion of the makers, that the paving directed would be, or appeared to them to be, for the benefit of the particular districts, they only direct the streets to be paved, and impose the tax for that purpose. And looking to these clauses alone, the mind is left to labour to discover why these particular districts are so taxed, and to conjecture that the paving appeared to the corporation to be for their benefit; but if we apply the preamble as a key, the mind of the makers is at once opened, and the intention clearly disclosed, by which it plainly appears, that the paving was meant in one case for the benefit of travellers, and the improvement of a public highway leading into the city, and in the other, to preserve the navigation; both of which objects were matters of general concern, and it was not considered to be for the benefit of either particular district, or intended for that purpose, and nothing is left to construction. The keeping in repair a public highway leading to the city, which is declared by the preamble to be the object of one of the ordinances in question, and the preservation of the navigation, the declared object of the other, are clearly matters of public and general concern, and in the latter case of peculiar benefit to the parts or districts of the city contiguous to the harbour; and there would be much hardship in taxing any particular part or district of the city for doing what is for the benefit of

another part, or for the benefit of the whole, the burden of which should be borne by the whole. The taxing the particular districts, therefore, in this case, not for their benefit, but for the benefit and convenience of the whole city, was unauthorised, and the ordinances so far nugatory and void.

JUDGMENT AFFIRMED.

THE MAYOR, &C. OF BALTIMORE, vs. HOWARD.

JUNE.

APPEAL from *Baltimore* county court. *Assumpsit* to recover a sum of money due for paying taxes imposed by the plaintiffs, (the appellants,) on the defendant, (the appellee.) Plea *non assumpsit*. At the trial, the plaintiffs gave in evidence an act of the general assembly, passed at November session 1796, *ch.* 68, entitled, "An act to erect *Baltimore* town, in *Baltimore* county, into a city, and to incorporate the inhabitants thereof." They also gave in evidence, another act of the general assembly, passed at November session 1797, *ch.* 54, entitled, "A supplement to the act, entitled, An act to erect *Baltimore* town, in *Baltimore* county, into a city, and to incorporate the inhabitants thereof." They further gave in evidence, an ordinance of the mayor and city council of *Baltimore*, approved March 9th, 1807, entitled, "An ordinance to appoint city commissioners, and prescribing their duties." And also gave in evidence, the following notice, signed by *Stouffer*, *Hynson* and *Martin*, the city commissioners and commissioners of health, on the 1st of April, 1817. "Notice is hereby given, that the office of the city commissioners and the commissioners of health is kept in the chamber of the Port Wardens, over the mayor's office, where the board will sit every Monday morning, at 9 o'clock, for the purpose of communicating and receiving information and applications from the citizens relative to the duties required of them by the ordinances of the city corporation, and for the accommodation of the public. *Samuel Young*, their clerk, will attend at the office daily, from the hours of 9 o'clock, A. M. to 1 P. M. and from 3 o'clock, P. M. to 5, except when engaged with the board on out door duties, and in that case, the orders and applications are requested

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The possession of a power by a corporation to do an act, is of itself the possession of the right to provide for the doing of that act by agents. But the giving a power to a corporation, and the giving authority to provide for the exercise of a power, are different—the authority to provide for the exercise of a power not being the possession of the power itself, but a right only to confer it, or to authorise the exercise of it by others.

All statutes made *in pari materia* are to be taken and construed together, as if they were one system; and that though not expressly referring to each other, and even after one has expired or been repealed.

Where an act of assembly authorises the collection of taxes imposed by such act, by distress or action of debt, or where an act authorises the tax, but gives no remedy, in either case an action of *assumpsit* will lie, on the principle that where the law gives a claim to one against another, it raises an implied *assumpsit* on the legal obligation to pay.

The giving a remedy by distress or action of debt, is cumulative only, and does not take away the action arising by implication on the legal

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to be left at the office, and will be duly attended." And proved also, that the said notice was published in the *Federal Gazette* and *American* newspapers. They also gave in evidence, that during the year 1817, *Henry Stouffer*, *Nathaniel Hynson* and *James Martin*, were city commissioners, duly appointed and qualified. And they further gave in evidence, that the following petition was made to the said commissioners on Monday the 7th day of April, 1817: "The honourable the mayor and city council of *Baltimore*. Gentlemen—We, the undersigners, property holders and tenants of the ground and premises lying on each side of *Hanover-street*, between *Lee* and *Hill-streets*, beg leave to state to your honours, that they are desirous the street above mentioned, to wit, *Hanover*, should be paved." (Signed by four persons.) And the following entries made in the books of said commissioners: "Monday, April 7th, 1817. The full board met. Received an application for paving *Exeter-street* from *Great York-street* to *Wilkes-street*, and one for paving *Green-street* from *Pitt* to *Great York-street*; also one for paving *Hanover-street* between *Lee* and *Hill-streets*." "Monday, May 12, 1817. The full board met. Received proposals from *S. W. Bayley* for paving *Hanover-street* from *Lee* to *Hill-street*." "Monday, June 25th, 1817. The board met. Present Messrs. *Martin* and *Hynson*. Sent to the collector warrant for paving tax on *Hanover-street*." And they further gave parole evidence, that upon said application, the said commissioners decided to pave said street, and obtained the verbal assent of the mayor of said city to such pavement; they also offered evidence by parole, that the signers of said petition constituted a majority of the proprietors and tenants inhabiting on said street, between the limits required to be paved. They also gave in evidence, the following warrant: "City of *Baltimore*, ss. The city commissioners to *Thomas Rogers*, Esq. city collector. Whereas a majority of the proprietors of lots bounding on *Hanover street*, between *Lee street* and *Hill-street*, and tenants residing thereon, by a written application to the city commissioners, bearing date the tenth day of March last, requested that the said street should be paved, and the said commissioners having determined on the propriety thereof, did cause to be made the following list of the names of the persons who are liable to pay the tax by law directed to be levied for paving said street, and the

amount of the same respectively due from each person, as follows, to wit: *John E. Howard,* &c. "We, the city commissioners do therefore in pursuance and by virtue of an ordinance, entitled, "An ordinance to appoint city commissioners, and prescribing their duties," hereby authorise, direct and require you to collect from the several persons above named, the sums of money annexed to their respective names, for the purpose above mentioned; and for so doing this shall be your sufficient warrant. Given under our hands and seals, this 23d day of June, 1817.

Nathaniel Hynson, (Seal.)

James Martin, (Seal.)

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Approved the 23d June, 1817, *Geo. Styles,* Mayor."

And also gave in evidence that the said street then was, and still is a street within the city of *Baltimore*; the plaintiffs further offered in evidence, that all that part of *Hanover-street* north of *Lee-street*, had been previously paved, (which is several squares,) and that one square of the city of *Baltimore* extends from *Lee-street* to *Hill-street*; and also gave in evidence a plot thereof, which had been made by the city commissioners, and that the city commissioners caused that part of *Hanover-street*, between *Lee* and *Hill-streets*, to be paved, and that the proportion of said paving tax, chargeable to the defendant, amounted to \$789 85. And the defendant, by cross examination of the plaintiffs' witness, proved that *Hanover-street* extended some distance on both sides of the part for the paving of which the petition was presented, and also that all the petitioners resided between *Hill-street* and *Busy-alley*, an intermediate alley between *Lee* and *Hill-streets*. The defendants then prayed the court to instruct the jury that the plaintiffs were not entitled to recover; which instruction the court [*Dorsey*, Ch. J. *Hanson* and *Ward*, A. J.] gave to the jury. The plaintiffs excepted, and the verdict and judgment being against them, they prosecuted this appeal.

The cause was argued in this court at the last June term before *BUCHANAN*, Ch. J. *EARLE*, and *MARTIN*, J.

Taney and *Scott*, for the Appellants, contended, 1. The ordinance of March 9th, 1807, conferred the power on the city commissioners to pave the street, and apportion the tax in the manner they have done, provided the proper number of inhabitants applied.

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2. The proper number of inhabitants did apply, and the power is well executed.

3. The action of *assumpsit* is a proper remedy.

Harper, R. Johnson, and Howard, for the Appellee.

This cause was argued in connexion with the case of *The Mayor, &c. of Baltimore, vs. Moore & Johnson, (ante 375.)*

Curia adv. vult.

BUCHANAN, Ch. J. at this term, delivered the opinion of the court. This case differs essentially from the case of *The Mayor, &c. of Baltimore, vs. Moore and Johnson, (ante 375.)* In that case the streets were directed to be paved, and the taxes imposed by special ordinances passed for that purpose. And in this case the paving, for which the amount of the tax sued for was imposed, was determined on by the city commissioners, under the authority of the ordinance of the 9th of March 1807, "to appoint city commissioners, and prescribing their duties;" and it is objected, on the part of the appellee, that no such authority could, under the charter, be conferred upon them, and therefore, that the ordinance itself is void, and the proceedings of the commissioners nugatory; which makes it necessary to inquire into the powers of the corporation in that respect.

By the *ninth* section of the charter, (1796, *ch.* 68,) it is enacted, "that the powers and authority vested in the town commissioners, special commissioners, and port wardens, heretofore appointed by law for *Baltimore-town*, except the authority of the town commissioners to hold elections agreeably to the constitution and form of government, shall cease and determine as soon as this act shall be in force and operation; and the corporation of the city of *Baltimore* are hereby declared to possess, and may provide for the exercise of all powers and authorities now vested in the said town commissioners, special commissioners, and port wardens, except the holding elections for delegates to the general assembly." Now, by the *sixth* section of the act of 1782, *ch.* 17, the special commissioners of *Baltimore* were, or a majority of them, directed and empowered "from time to time, as often as there might be occasion, to meet and consult together respecting what streets, or parts of streets, and what lanes or alleys, were to be paved;" "to contract for all the materials for the purpose, and to

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employ such and as many workmen as they should judge necessary," &c. By that act unlimited discretionary power was vested in the special commissioners of *Baltimore*, to determine what streets should be paved, &c. By the *ninth* section of the charter, the corporation is authorised "to provide for the exercise" of the same power. Provide for the exercise, how? Why, if necessary, by some other person or persons, and not exclusively by themselves; the very conferring of the power upon them, being of itself a provision for the exercise of it by them, and rendering the express authority "to provide for the exercise of them" unnecessary, if by it the exercise of it by themselves is meant. The *eighth* section of the charter also gives "full power and authority to the corporation to pass all ordinances necessary to give effect and operation to all the powers vested in them," which surely was sufficient authority to them to pass any ordinances necessary to the exercise of the powers conferred by the *ninth* section, no matter what these powers might be. The provision of the *ninth* section, therefore, authorising the corporation to provide for the exercise of them, was wholly unnecessary, unless it was intended to give them the power to provide for the exercise of them by some other persons or agents. The possessing a power, and having authority to exercise a power, are one and the same; and the vesting in the corporation all the powers and authorities of the special commissioners, was an ample provision by the legislature for the exercise of those powers by the corporation, and full authority for them to do so. But "the giving a power," and the giving authority "to provide for the exercise of a power," are not the same, but different—the authority to provide for the exercise of a power, not being the possession of the power itself, but a right only to confer it, or to authorise the exercise of it. In this case the intention of the legislature was not to authorise the corporation to provide for the exercise of the powers of the special commissioners, by passing ordinances giving authority to themselves to exercise these powers, that authority being before fully vested, but having so clothed them with these powers, to give them the further power "to provide for the exercise" of them, by their authorised agents, in such manner as in their judgment might be best. The exercise of a power, and providing for the exercise of a power, are very

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different things. The passing an ordinance directing any particular street to be paved, would be an exercise by the corporation of the power and authority transferred to them from the special commissioners, to determine what streets shall be paved. But the passing an ordinance, as in this case, authorising the city commissioners to meet and determine what streets shall be paved, would be a providing "for the exercise," by the city commissioners, of that power originally confided to the special commissioners. If the corporation has no right "to provide for the exercise," by the city commissioners or others, of the powers formerly possessed by the special commissioners, that clause of the ninth section of the charter, authorising them "to provide for the exercise" of these powers, is perfectly nugatory, since without it they possessed all the powers of the special commissioners, with authority to exercise them themselves, (which is the same thing, there being no difference between the power to do a thing, and authority to exercise the power of doing it,) and also in the language of the *eighth* section of the charter, "full power and authority to pass all ordinances necessary to give effect and operation to those powers," and consequently to make any provision by ordinance, necessary to their due exercise of them. The words and meaning of one part of a statute may sometimes lead to and furnish an explanation of the sense of another; and it is a rule in the exposition of statutes, that one part should be taken with another, and the whole be considered together, and so construed as that no clause, sentence or word, shall if it can be avoided, be superfluous or insignificant. The clause in question of the *ninth* section of the charter, was intended to have some meaning; to construe it to mean, that the corporation shall have authority to provide for the exercise by themselves only of the "powers and authority" before confided in the special commissioners, would be to render it superfluous, provision for the exercise of them by the corporation, being before made by the same section, in conferring upon the corporation all those powers and authorities; and also the right to provide for the exercise of them, by the general and full power and authority given to the corporation by the *eighth* section, "to pass all ordinances necessary to give effect and operation to all the powers vested in them." And it cannot be taken to have been used without meaning, but was

intended by the legislature to perform some office, and by construing it to mean that the corporation may provide for the exercise of those powers by their authorised agents, or in any manner best suited in their judgment to the end intended, it will be rendered neither superfluous, nor insignificant, but a sensible effect and operation will be given to it, not inconsistent with any of the provisions of the charter. And other clauses of the charter show that to be the sense in which it was used, by showing that it would be superfluous if differently construed. The special commissioners had power and authority to determine on the mode of paving, to contract for materials, and with such and as many workmen as they might judge necessary to be employed; the same power is vested in the corporation. And can it be said, that they have no right to authorise the city commissioners, or other agents, to exercise that power? If they have the right, and if they can authorise the city commissioners to contract for materials for paving, to determine on the mode of paving, and to contract with such workmen as they may judge necessary, why may not the corporation empower them to determine what streets shall be paved? One equally with the other is an employment of the mind, an exercise of the judgment. Why can they "provide for the exercise," by the city commissioners, of one of the powers of the special commissioners more than another? Is there any thing in the charter authorising such a discrimination? If there is, we have not been able to discover it. Moreover, by the *second* section of the act of 1797, *ch.* 54, the supplement to the charter, "full power and authority are given to the corporation to pass all laws and ordinances necessary for paving and keeping in repair the streets." This is a general and sweeping power, an absolute discretionary power to pass any ordinance which in their judgment may be necessary for paving the streets, &c. In the exercise of which, it is not required of them to incorporate, in any ordinance they may pass, a declaration or expression of their opinion of the necessity for passing it. The ordinance itself, if nothing appears to the contrary, must in general be taken as evidence of their thinking it necessary; yet if it should appear upon the face of it to be unnecessary, it would in such case be an excess of authority, and void. But is that the case here? All ordinances are passed by the city council, who sit only once

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a year, and though it is true they may be convened by the mayor whenever, in his opinion, the public good may require it, yet there is an expense and inconvenience attending their frequent meetings, that would be burdensome to the city, and vexatious to the individual members of the city council, which it may be expedient to avoid, and which the ordinance in question is calculated, and was probably intended to obviate, the city commissioners being by it directed to meet twice in every month, who are thus enabled to provide for exigencies as they may arise. And there may be a necessity every month in the year, or oftener, for paving or repairing some street or other in the city, which could not well be attended to by the city council. If then such an ordinance was necessary for paving and keeping in repair the streets, it was authorised by the general and full power given by the supplement, "to pass all laws and ordinances necessary," &c. and is free from the objection, that it delegated to the city commissioners powers which the corporation had no right to transfer. It is not a power to impose a *duty*, or to *make a law* directing a street to be paved, that the corporation could not delegate, and can only exercise themselves, but merely an authority to ascertain, as the agents of the corporation, what streets ought to be paved.

The original act, and the supplement, are to be considered as one system, and the provision of the ninth section of the former, authorising the corporation "to provide for the exercise" of the powers of the special commissioners, and the general power given to them by the latter, to pass all ordinances necessary for paving and keeping in repair the streets, &c. to be construed as if they formed one section or clause, giving full power and authority "to provide for the exercise" of all the powers and authorities which had been confided to the special commissioners, by passing any ordinances necessary for paving and keeping in repair the streets, &c. And so construed, the passing an ordinance, empowering and directing the city commissioners to meet from time to time, to ascertain and determine, (which is all that the ordinance does,) as the agents of the corporation, what streets, &c. ought to be paved or repaired, will be found to be no abuse or excess of power by the corporation. But in truth there is no discretionary power delegated to the city commissioners to say what streets, &c. shall be

paved. The language of the ordinance is "that the city commissioners, or a majority of them, on the first and third Mondays in every month, at such time and place as they may appoint, shall meet and consult together, respecting the levelling, pitching, and paving or repairing the streets, &c. within the city;" "and that the said commissioners may, with the approbation of the mayor, from time to time, proceed to the paving of such streets, &c. only, as a majority of the proprietors and tenants inhabiting thereon shall require." The directions to the commissioners are *to meet and consult together*, but with authority to pave no street without the approbation of the mayor, nor unless it shall also be required by a majority of the proprietors and tenants inhabiting thereon.

Thus the approbation of the mayor, and the request of a majority of the proprietors and tenants, are made a rule for the government of the commissioners. They are made the evidence (by which the commissioners are to be governed,) of the propriety of paving any street, in the absence of which they could proceed to pave none.

It is a determination of the corporation, expressed by ordinance, that the approbation of the mayor, and the request of a majority of the proprietors and tenants inhabiting thereon, is sufficient evidence of the propriety of paving a street, with authority only to the commissioners to proceed under such circumstances to the paving of it.

It was not denied in argument, and is therefore taken as conceded, that the authority given to the commissioners was in this case regularly pursued. As to the tax, it was not, as has been imagined, imposed by the commissioners; they had no authority to do so, nor could the corporation confer upon them such a power, but it was imposed by the ordinance itself, and the assessing and levying of it by them, as directed by the ordinance, was only an apportionment of it—a mere matter of figures and calculation, a ministerial act to carry the law into effect, which it was the duty of the commissioners to perform. In the case of *The Mayor, &c. of Baltimore, vs. Moore and Johnson*, it was held, that the corporation could not tax any particular part or district of the city for paving, unless such paving appeared to be for the benefit of that particular part or district. But in any ordinance directing a street to be paved, and imposing a tax on the district for that purpose,

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it need not be stated to be for the benefit of such district, but will be so taken if nothing appears to the contrary. Here the paving was under the authority of a general ordinance, on the application of a majority of the proprietors and tenants residing on the street, and with the approbation of the mayor, as required by the ordinance. The paving of streets is *prima facie* for the benefit of the parts or districts of a town through which they pass, and more especially when applied for by a majority of the immediate inhabitants; and in directing a tax to be levied on such districts for that purpose, the corporation must be considered as having acted on that principle; nothing appearing in the ordinance to the contrary. And though in particular instances it may turn out not to be practically for the benefit of the immediate district, yet that cannot affect the validity of the ordinance, which had such benefit in view. The objection that the application to the commissioners to have the street in question paved, was not made by the proprietors of a majority of the property lying on the street, cannot be sustained; it was made by a majority of the proprietors and tenants inhabiting thereon, in the language of the ordinance, and the act of 1817, *ch.* 148, *s.* 18, declaring "that the mayor and city council shall not be authorised to cause any unpaved street, &c. to be paved, without the assent, in writing, of the *proprietors of a majority of the ground* binding and fronting on such street," &c. must be understood as having a prospective operation only, and not applying to this case, the assessment having been made, and a list of the persons liable to pay the tax, with the amount to be paid by each person, delivered to the city collector for collection, and contracts also entered into for paving the street, before the law was passed.

The objection that the ordinance of the 9th of March 1807 does not designate the persons who are liable to pay the paving tax, at first view has more force; but however strong it might be considered, construing the *ninth* section by itself, it must yield to the principle, that all statutes made in *pari materia* are to be taken and construed together, as if they were one system. 6 *Bac. Ab.* tit. *Statute*, 382. *Rex vs. Loxdale*, 1 *Burr.* 447. *Curch vs. Croker*, 3 *Mass. Rep.* 21. And that though not expressly referring to each other, and even after one has expired or

been repealed. By the *first* section of the ordinance of the 6th of March 1800, it is directed that the taxes imposed for paving any street, &c. directed to be paved, shall be levied and collected from the owners of lots on each side of such street; thus clearly designating the persons who are to pay such taxes. This ordinance was repealed by the ordinance of the 10th of April 1807, but was in full force when the ordinance of the 9th of March 1807 was passed, and therefore to be considered as in the view of the city council at the time, and being in *pari materia*, is to be taken together with the ordinance of the 9th of March 1807, which so taken together, must be construed as if the provision of the ordinance of the 6th of March 1800, designating the persons liable to pay the tax, was transcribed into it. And so construed, "the owners of the lots on each side of a street, directed to be paved," are designated by the ordinance as the persons liable to pay the tax, and the duty of the commissioners, in making out the list, is merely ministerial. The circumstance, that the ordinance of the 6th of March 1800, has since been repealed, does not affect the construction of the ordinance of the 9th of March 1807. Whatever was the intention of the makers at the time, furnished the rule of construction, and whatever was the correct and legal construction then, is the true construction now, the construction of a law, being the law itself. It is said that the ordinance of the 29th of April 1797, may as well be called in aid of the construction of the ordinance of the 9th of March 1807, (the language being the same,) as the ordinance of the 6th of March 1800. But the ordinance of the 29th of April 1797, is virtually repealed by the ordinance of the 6th of March 1800, which provides a different mode of assessment, and that new mode of assessment is adopted by the ordinance of the 9th of March 1807, which shows, that it was to the ordinance of the 6th of March 1800, then in force, that the city council looked when they passed the ordinance of the 9th of March 1807.

There is nothing in the objection, that it does not appear that the return directed by the *second* section of the ordinance of the 9th of March 1807, to be made by the clerk to the register of the city, of the proceedings of the commissioners, was ever made. The omission to do so, although an act of negligence, does not vitiate what was cor-

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rectly done, or exonerate the appellee from the payment of the tax imposed, the liability to which did not in any manner depend upon the discharge, by the clerk or the commissioners, of that branch of their duty, but was created before, and existed independently of it.

The objection that the action was improperly conceived, is founded on the *tenth* section of the act of 1796, the act of incorporation, which authorises the collection of the taxes imposed in virtue of that act, by distress or action of debt, on the supposed ground that they can be recovered in no other way. But the tax in this case was imposed under the supplement, the act of 1797, *ch. 54*, which authorises the tax, but gives no remedy; and where no particular remedy is given, the action of *assumpsit* will lie, on the principle, that where the *law* gives a claim to one against another, it raises an implied *assumpsit* on the legal obligation to pay. But if the tax in question was in fact imposed in virtue of the original act of incorporation, it would make no difference, for the giving a remedy by distress or action of debt, is cumulative only, and does not take away the action arising by implication on the legal obligation to pay a claim created by law.

We are upon the whole of opinion, that the appellants are entitled to recover, and therefore reverse the judgment.

JUDGMENT REVERSED.

JUNE.

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In an action against a ship owner, for the loss of goods which he had engaged to transport for freight, it is not necessary to aver in the *Narr.* the payment of the freight, or the tender of it.

A contract made by the master of a general ship, is in law the contract of the owner, the master being considered the duly constituted agent of the owner for that purpose.

A bill of lading, signed by the master, for goods delivered on board his vessel for transportation, is the contract of the owner of the vessel.

If the bill of lading contains an exception "of the dangers of the seas," such exception must be stated in the declaration.

Every proviso in a contract, which goes to discharge the liability under it entirely, must be stated in the declaration, otherwise if it only goes to diminish the liability.

A surety in an administration bond, is a competent witness for the administrator.

The judgment for costs against a plaintiff administrator, is never *de bonis testatoris*, and the administration bond is not liable for such costs.

APPEAL from *Baltimore* county court. This was an action of *assumpsit*, instituted by *Charles Cappeau*, the appellee's intestate, against the appellant, to recover the value of four cases and three bales of dry goods, shipped on board a vessel of the appellant, called the *Cecil*, by the said intestate, to be transported for freight from *Baltimore* to *Norfolk*, and which the declaration alleges were wholly lost by the negligence of the appellant. The declaration states, "that heretofore, to wit, on the eleventh day of October, in the year one thousand eight hundred and fifteen, at *Baltimore* county aforesaid, in consideration that the said *Charles Cappeau*, at the special instance and request

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of the appellant, had shipped and put on board a certain vessel of the appellant, called the *Cecil*, then lying in the port of *Baltimore*, in the county aforesaid, whereof a certain *William Pennington* was then and there master and commander, certain goods and merchandise, to wit, four cases and three bales of dry goods, of him the said *Charles Cappeau*, of a large value, to wit, of the value of two thousand dollars, lawful money, to be safely and securely carried, transported, and conveyed by water, in the said vessel, from the said port of *Baltimore* to *Norfolk*, in the State of *Virginia*, upon freight, to be therefor paid him the appellant by the said *Charles Cappeau*, he the appellant undertook, and then and there faithfully promised the said *Charles Cappeau*, safely and securely to carry, transport, and convey by water, in his aforesaid vessel, the said goods and merchandise of the said *Charles Cappeau*, from the said port of *Baltimore* to *Norfolk*, in the said State of *Virginia*, and there safely and securely to deliver the same to the use of the said *Charles Cappeau*; yet the said *Charles Cappeau* in fact saith, that the said appellant, not regarding his said promise and undertaking, so by him in manner and form, in this behalf made as aforesaid, but contriving and fraudulently intending, craftily and subtilely, to deceive and defraud the said *Charles Cappeau* in this behalf, hath not as yet, safely and securely carried, transported or conveyed, the said goods and merchandise of him the said *Charles Cappeau*, from the said port of *Baltimore* to *Norfolk* aforesaid, and there safely and securely delivered the same to the use of the said *Charles Cappeau*, according to the tenor and effect of the said promise and undertaking of the said appellant, although a reasonable time for that purpose has long since elapsed, and although so to do, he hath been often requested by the said *Charles Cappeau*; but on the contrary thereof, he, the said appellant, before the impetration of the writ original of the said *Charles Cappeau* in this cause, to wit, on the first day of November, in the year aforesaid, at the county aforesaid, so negligently and carelessly managed and conducted himself in the premises, and took so little and so bad care of the said goods and merchandise of the said *Charles Cappeau*, that the same became, and were, and still are, wholly lost to the said *Charles Cappeau*, to wit, at the county aforesaid, to the damage of the said *Charles Cappeau*, in the sum of four

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thousand dollars," &c. After the filing of the declaration *Charles Cappeau* died, and the appellee, as his administratrix, was made a party. The appellant pleaded *non assumpsit*. At the trial, the appellee proved, 1. That one *Joseph Cappeau*, a merchant of *Baltimore*, on the 11th of October 1815, by order, and for and on account of *Charles Cappeau*, the intestate of the appellee, and a resident merchant of *Norfolk*, shipped four cases and three bales of dry goods, on board a sloop called the *Cecil*, the property of the appellants, and one of a line of packets belonging to the defendant, and running between *Baltimore* and *Norfolk*. One *Walton Gray*, the agent for that purpose of the appellant, on the delivery of the goods on board the sloop, gave to *Joseph Cappeau* the following bill of lading: "Shipped in good order and well conditioned, by *Joseph Cappeau*, by order and for account of *Charles Cappeau*, of *Norfolk*, in and upon the sloop or vessel called the *Cecil*, whereof *William Pennington* is master, now in the port of *Baltimore*, and bound to the port of *Norfolk*, four cases and three bales of dry goods, to be delivered in the like good order and condition at the port of *Norfolk* aforesaid, (the dangers of the seas only excepted,) unto the aforesaid *Charles Cappeau*, or his assigns, he or they paying freight for said goods, as is customary. In witness whereof I have affirmed to three bills of lading of the same tenor and date, (one of the cases being wet, not to be answerable in case of damage.)

Given under my hand, at *Baltimore*, the 7th October, 1815.

Walton Gray, Agent for Wm. Pennington,"

The goods were of the value of \$2055 14 cents. The defendant offered no evidence, either to show that the said goods, were ever transported to the port of *Norfolk*, or that they were ever ready there to be delivered to *Charles Cappeau*, or to his order. On these facts, the appellant, by his counsel, moved the court to direct the jury, that the appellee was not entitled to recover unless proof was offered to the jury that the freight for the goods had been tendered. This direction, [*Hanson and Ward, J.*] gave; the appellee excepted. 2. The appellee then gave evidence that *Joseph Cappeau* had a conversation with *William Pennington*, the master of the sloop, after his return to *Baltimore*, in the presence of the appellant, in which he asked *Pennington*

what he had done with the goods, who replied he had delivered them to a *Frenchman* of low stature and dark complexion, who presented the bill of lading for them. The appellant, by his counsel, again prayed the court to direct the jury, that the appellee was not entitled to recover. Which direction the court, [*Hanson and Ward, J.*] refused to give. The appellant excepted. 3. The appellee further gave in evidence to the jury, that at the time of shipping the goods, as stated in the previous exceptions, the appellant gave, by his agent, three bills of lading, of the same tenor and date as the one inserted in the first bill of exceptions, one of which was retained by the appellant or his agent, another delivered to *Joseph Cappeau*, and the third enclosed in a letter from *Joseph Cappeau* to *Charles Cappeau*, at *Norfolk*, and put into the letter box of said sloop *Cecil*, which was an open box, and that upon the return of the *Cecil* from *Norfolk*, *Joseph Cappeau* having understood that the goods had not been delivered to *Charles Cappeau*, inquired of *Pennington*, the captain of the sloop, what he had done with them, who replied that he delivered them at *Norfolk*, to a person whom he did not know, but who seemed to be a *Frenchman*, and a tow man, of dark complexion, who presented a bill of lading, and paid the freight. *Joseph Cappeau* further inquired of *Pennington* where the bill of lading was, who replied that he did not know, he had it not. The appellant, by his counsel, then prayed the opinion of the court to the jury, that the appellee was not entitled to recover. Which opinion the court, [*Hanson and Ward, J.*] refused to give. The appellant excepted. 4. The only question raised in the fourth exception, which was before this court, was, whether *Joseph Cappeau*, who was one of the sureties on the administration bond of the appellee, was a competent witness for the appellee. He was also one of the distributive representatives of the appellee's intestate, but the objection to his competency on that account was removed by a release. The court below, [*Hanson and Ward, J.*] were of opinion, that the witness was competent, and suffered him to be examined. The appellant excepted; and the verdict and judgment being against him, he prosecuted this appeal.

The cause was argued before BUCHANAN, Ch. J. STEPHEN, and ARCHER, J.

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J. Glenn and R. Johnson, for the Appellant, contended, 1. That it ought to have been averred in the *Nar*, that the freight for the goods was paid, or tendered to be paid. 2. That although it might not have been necessary to make such an averment, the appellee ought to have proved the payment or tender. 3. That, the bill of lading shows, that the contract given in evidence was different from the one declared upon. 4. That *Joseph Cappeau*, being a surety on the administration bond of the appellee, was not a competent witness for the appellee; and 5. That there was no evidence to entitle the appellee to recover.

On the first and second points, they cited 2 *Phill. Ev.* 82, (note A.) *Hyde vs. The Trent & Mersey Navigation Co.* 5 *T. R.* 389, 396, *pr. Buller J.* 1 *Com. Cont.* 358. *Morton vs. Lamb*, 7 *T. R.* 121. *Colonel vs. Briggs*, 1 *Salk.* 112. *Rawson et al. vs. Johnson*, 1 *East*, 203. *Waterhouse vs. Skinner*, 2 *Bos. & Pull.* 447. *Towson vs. The Havre-de-Grace Bank*, (*ante* 47.) *Hudson vs. Goodwin*, 5. *Harr. & Johns.* 115; and *Slacum vs. Pomery*, 6 *Cranch*, 211.

On the third point, to 1 *Chitty Plead.* 134, 300. 2 *Went.* 263, 265. *Abbot on Shipping*, 287, *ch.* 4. *Ibid* 132, 140. 291. *Atty et al. vs. Parish et al.* 4 *Bos. & Pull.* 104. *Peake vs. Carrington*, 2 *Brod. & Bing.* 399, (6 *Serg. & Lowb.* 169.) *Samuel vs. Darsh*, 2 *Starkie*, 62, (3 *Serg. & Lowb.* 245.) *Hatham et al. vs. The East India Co.* 1 *T. R.* 638. 2 *Jac. L. D.* 230. *Clay vs. Willan et al.* 1 *H. Blk.* 298; and 4 *Campb.* 20.

On the fourth point, to *Bean's Ex'r. vs. Jenkin's Adm'r.* 1 *Harr. & Johns.* 135. *Wallace vs. Britten*, *Ibid* 478. 1 *Bac. Ab. tit. Baron & Feme*, (F.) 485. *Riddle vs. Moss*, 7 *Cranch*, 206. *Carter vs. Pearce*, 1 *T. R.* 163. 2 *Burn's Eccl. Law*, 641. *Archbishop of Canterbury vs. Wills*, 1 *Salk.* 316. The act of 1785, *ch.* 80, *s.* 1. *Carter vs. Pearce*, 1 *T. R.* 163, *Buller J.* The act of 1798, *ch.* 101, *sub ch.* 8, *s.* 5; *sub ch.* 3, *s.* 11. 2 *Harr. Ent.* 693.

On the last point, to 2 *Esp. on Evid.* 265. 1 *Phill. Evid.* 150, (158,) and 2 *Phill. Evid.* 82.

Meredith and Wirt, (Attorney-General U. S.) for the Appellee, contended, 1. That the declaration was sufficient. They cited 2 *Went. Plead.* 273. The bill of

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lading is not the contract. 1 *Schw. N. P.* 339. *Hunter vs. Prinsip et al.* 10 *East*, 377. *Dewell vs. Moscon et al.* 1 *Tawrt.* 390. *Laws on Char. Part ch. 3*, page 371, 373. *Hothan vs. The East India Co.* 1 *T. R.* 638. 1 *Saund.* 263, (note 2.) 1 *Chitt. Plead.* 228. *Lane vs. Pennyman*, 4 *Mass. Rep.* 91. *Sir Anthony Wane's case*, 5 *Coke*, 21.

2. *Joseph Capeau* was a competent witness. They referred to the acts of 1798, *ch. 101, sub ch. 8, s. 5*; 1785, *ch. 80. Wallace vs. Britten*, 1 *Harr. & Johns.* 478. *Bac. Ab. tit. Baron & Feme, (F.)*

3. They contended, that if the declaration was sufficient there was enough evidence to entitle the appellee to recover. Whether the goods were lost by the negligence of the appellant, or delivered to *Charles Capeau*, was a fact upon which the jury only could decide, and that therefore the court were right in refusing to grant the general prayer of the appellant, that the appellee was not entitled to recover.

BUCHANAN, Ch. J. delivered the opinion of the court. This case comes upon three bills of exception, taken on the part of the appellant, who was defendant below, being the *second, third, and fourth* bills of exceptions contained in the record; the second and third on the refusal by the court to direct the jury, that the plaintiff, the appellee, was not entitled to recover. To which four objections are raised. The 1st. That there ought to have been an averment in the declaration, that the freight was paid, or tendered to be paid. The 2d. That payment, or tender of the freight, ought to have been proved. The 3d. That there was no evidence in the cause to entitle the appellee to recover; and the 4th. That the bill of lading shows a material variance between the declaration, and the contract of the parties. There appears to be very little in the three first of these objections. The action was not merely for a refusal to deliver the goods, but for the entire loss of them to the appellee, by the carelessness and negligence of the appellant, by which he was rendered unable to deliver them. It is not like the case of a contract of sale, where there are dependent conditions, in which the performance of one, depends upon the previous performance of the other; or where there are mutual conditions to be performed at one and the same time, and neither party has

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done any thing to exempt the other from performance on his part.

But the declaration presenting a case in which no freight had been earned, and consequently no obligation to pay any, it would not only have been nugatory to aver either a payment or tender, but such an averment would have been inconsistent with the other allegations in the declaration, showing that the appellant was entitled to no freight, and that an independent cause of action existed for the negligently losing the goods, on the undertaking safely and securely to carry and transport them from *Baltimore* to *Norfolk*.

The second objection, "that payment, or a tender of the freight, ought to have been proved, to entitle the appellee to recover," is obnoxious to the same answer; for if the goods were either in fact negligently lost, or safely conveyed to *Norfolk*, and delivered by the master to a wrong person, though by mistake, or if any other act was done by him, rendering a delivery of them to the appellee impracticable, the appellant was entitled to no freight, and of consequence the appellee was under no obligation to pay or to tender any. A declaration by the master, that he had delivered the goods to a *Frenchman*, who presented the bill of lading for them, appears in the second bill of exception; and in the third, that he had delivered them at *Norfolk* to a man he did not know, who appeared to be a *Frenchman*, and who presented the bill of lading, and paid the freight. There does not appear to have been any endorsement or assignment of the bill of lading; and if the person to whom they were delivered was not the appellee, nor authorised to receive them, it was a delivery by the master to a wrong person, by which they became lost to the appellee, and there existed no demand on him for freight. As to the third objection, as it relates to the evidence alone in the cause, unconnected with the pleadings, the court certainly did right in refusing to instruct the jury that the appellee was not entitled to recover; the question, whether the goods were safely carried to *Norfolk*, and delivered to the appellee, or other person having authority to receive them, being clearly a question of fact proper for the decision of the jury, on the evidence contained in both the second and third bills of exceptions.

The fourth objection, that there is a variance between the declaration and the contract proved, arises out of the general prayer to the court in each bill of exceptions, to instruct the jury, that the plaintiff was not entitled to recover.

It is a settled rule in pleading, that in an action founded upon a contract, if there be in the contract a proviso or condition which operates only in defeasance of it, or merely respects the liquidation of damages after a right to them has arisen by a breach of the contract, it is not necessary to be stated in the declaration, but should come from the other side; but that if there be a condition precedent, or a proviso or other matter which qualifies the contract, or goes in discharge of the liability of the defendant, it must be stated.

The master of a vessel, being the authorised agent of the owner, the principle, that a contract made by the master of a *general ship*, for the conveyance of merchandise, is considered in law to be made with the owner also; and that each is separately bound to the performance of it, is too well established now to be questioned. The terms of a bill of lading, signed by the master, constitute the engagement or contract of the owner, for the breach of which he is liable to be sued, subject to such exceptions as it may contain, restraining the general responsibility to which he would otherwise be liable as a carrier.

The bill of lading in this case has an exception "of the dangers of the seas," which does not merely respect the amount of damages to be recovered, but it limits and restrains, it changes the general obligation, and qualifies the particular contract, of which it is as much, and as material a part, as any clause in it, and the general obligation being thus restricted, the appellant, as owner, is only answerable on his special undertaking, as evidenced by the bill of lading. What then is that special undertaking? Why, to deliver the goods in good order and condition at the port of *Norfolk*, the dangers of the seas only excepted; not a general undertaking at all events to deliver them, but only to deliver them, if not prevented by the dangers of the seas, a strictly qualified contract; and the declaration charges a general undertaking to transport the goods safely and securely to *Norfolk*, and there to deliver them to the appellee, without any restriction or qualification. The

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plea is *non assumpsit*, denying the contract as laid in the declaration, against which alone the appellant comes to defend himself, and the bill of lading showing a different and qualified undertaking, is produced in evidence by the appellee.

It is an established general rule, that when the contract proved varies from that stated or described in the declaration, the plaintiff must be nonsuited.

The contract proved here is essentially different from that declared upon, and we think the variance fatal.

The question arising on the fourth bill of exceptions, is whether *Joseph Cappeau*, being one of the sureties in the administration bond of the appellee, was a competent witness in her behalf, the objection growing out of the circumstance of his being also entitled to a distributive proportion of the estate of *Charles Cappeau*, being removed by the release filed in the cause. Whatever force there might have been in the objection, if he could have been made answerable for the costs of this suit, in an action against him on the administration bond, that objection falls to the ground, when it is perceived that no action for the costs could be sustained on the administration bond, either against him, or the appellee, the principal in the bond: In *England*, costs are sometimes given against an executor or administrator plaintiff, in his individual character; as if he names himself executor or administrator in an action, where he may sue in his individual capacity; there if he fails he is personally liable for costs, as in an action for trover and conversion after the death of the testator or intestate, &c. But where he is obliged to sue in his representative character, the judgment for costs is never *de bonis testatoris*, &c. and the act of 1798, *ch. 101, sub ch. 8, sect. 5*, makes no difference in the form of the judgment against an executor or administrator plaintiff, but he is to be answerable for costs in the same manner as the deceased would have been, that is in his individual character. That act does not give a judgment for costs *de bonis testatoris*, in the case of a plaintiff executor or administrator, but leaves the judgment to be entered *de bonis propriis*, as it is in *England*, in cases where a plaintiff executor or administrator is liable for costs, but goes farther than the practice in *England*, and gives costs to defendants in every case, by extending that judgment *de bonis propriis* for

costs against executors and administrators, to all cases in which they are plaintiffs. And this construction of the act is sustained by that clause of the same section, which provides that executors and administrators shall be allowed in their accounts for the cost so awarded against them, provided the courts awarding them shall certify that there were probable grounds for instituting, prosecuting, or defending the suits, &c. for if the judgment was to be *de bonis testatoris*, that clause would be wholly nugatory. And there is no hardship, nor any thing unreasonable in this, since at the same time that it prevents the waste of the estates of deceased persons, in frivolous and vexatious suits, which executors and administrators might be tempted to bring, if they were exempted from all liability for costs, affords them ample protection in the authority given to the orphans courts to make them an allowance for costs in the settlements of their accounts, whenever such allowance shall appear to be proper.

When costs awarded against an executor or administrator plaintiff, are allowed by the orphans court, on the certificate of the court in which the suit was tried, he becomes legally entitled to retain them out of the assets in his hands, and is not answerable for them on his bond; and if they are not allowed, they cannot be levied *de bonis testatoris*, the judgment being against the executor or administrator *de bonis propriis*, and the assets of the deceased altogether unaffected by it. And in no event can the sureties in an administration, or testamentary bond, be answerable for costs awarded against an administrator or executor plaintiff; *Joseph Cappeau*, therefore, was a competent witness.

JUDGMENT REVERSED, AND, PROCEDENDO AWARDED.

RIGDEN vs. MARTIN.

JUNE.

APPEAL from a decree of *Baltimore county court*. The bill, which was filed by the appellee, (the complainant below,) was for an account, and to recover from the defend-

Arbitrators must give the parties concerned notice of the time and place of their meeting on the arbitration.

It is not necessary, however, that the award itself should state that such notice was given. To impeach an award for the want of notice, or on account of any other fact, *de hors* the award, an application, supported by affidavit, must be made to set it aside.

Where arbitrators are authorised, on their differing in opinion, to call in a third person, they may call him in immediately, and before they differ.

An award is not vitiated by the arbitrators joining with the umpire in making it.

Where a decree states that the cause was ready for hearing, it will be presumed by the appellate court that it was, though it does not appear to have been set down for hearing.

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ant, (the appellant,) the balance that might be found due by him to the complainant. It is unnecessary to state the facts set forth in the bill; they were substantially denied by the answer. A commission was issued to take testimony, which was executed and returned. The cause was afterwards referred to two arbitrators, who were, if they disagreed, to choose a third person, and they, or any two of them, after adjusting the dispute between the parties, were directed to return their award, in writing, to the court. The arbitrators did select a third person, without its appearing that they had first differed in opinion, and the three returned this award: "The above named referees *J. W. Collins* and *Josh. Jamison*, having chosen *Robt. C. Long* as a third-person in the above case, said persons have agreed to the following award, that is, that *Jno. E. Rigden*, in their judgment, (agreeably to the papers and other circumstances,) is indebted to *Jno. Martin*, for carpenter's work, &c. on the house in *St. Paul's* street, the sum of five hundred and fifty dollars, and costs of suit. As witness our hands, this 2nd of November 1822. Charges to be paid to referees, exclusive of above, fifteen dollars—total five hundred and sixty-five dollars.

Jas. W. Collins,

Jos. Jamison,

Robert Curey Long.

To this award the appellant filed several objections, which the court below, [*Hanson J.*] overruled, and passed the following decree: *John Martin vs. John E. Rigden*. Baltimore County Court, sitting as a court of equity. This cause standing ready for hearing, the bill, answer, exhibits and award, being read and considered, it is by this court, and the authority thereof, this 7th of December, 1822, adjudged, ordered and decreed, that the said defendant, *John E. Rigden*, pay to said *John Martin*, the sum of five hundred and fifty dollars, with interest from the second day of November, eighteen hundred and twenty-two, and costs of suit, including the costs of the arbitrators.

Chs. W. Hanson.

From this decree the appellant appealed. The nature of the objections to the award sufficiently appears in the points made by the appellant's counsel, and hereafter mentioned.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, STEPHEN, and ARCHER, J.

R. Johnson, for the Appellant, contended, that the decree was erroneous, 1. Because the award, on which it was founded, showed on its face that the arbitrators had called to their assistance a third person, before they had themselves differed in opinion. 2. Because there was no evidence that the appellant had had notice of the time and place of the meeting of the arbitrators. 3. Because the objections which were filed to the award were not expressly overruled by the court below, or at all noticed in their decree; and 4. Because the cause was not ready for a decree at the time the decree was passed.

On the first point he cited *Kyd on Awards*, 91.

On the second, *Walker vs. Frobisher*, 6 *Vez.* 70; and *Hood vs. Leuke*, 12 *Vez.* 412.

On the last, *Cressey vs. Carrington*, 1 *Vern.* 469.

J. Glenn, for the Appellee, on the first point, cited *Calwell on Arbitration*, 123, 124. *Spriggins vs. Nash*, 5 *Maule & Selw.* 193; and *Kyd on Awards*, 6.

On the second, *Hawkins vs. Colclough*, 1 *Burr.* 274. *Ryan & Moody's N. P. Rep.* 17. *George vs. Lousley*, 8 *East*, 13; and *Tillard's Lessee vs. Fisher*, 3 *Harr. & M'Hen.* 118.

MARTIN, J. delivered the opinion of the court. A bill was filed on the equity side of *Baltimore* county court, by *John Martin* against *John E. Rigden*, on a contract entered into between them, and others, who had associated themselves together to build certain houses in the city of *Baltimore*. After testimony had been taken under a commission returned to the court, upon the application of the parties, all matters in dispute in the cause depending were referred, by order of court, to *James W. Collins* and *Joseph Jamison*, and if they should disagree, to choose a third person; and an award made by them, or any two of them, in writing, should be final between the parties. The arbitrators returned to the court an award in the following words: (He here stated the award.) A motion was made to set aside this award; and two objections are made to the validity of it. 1st. It does not appear notice was given to the parties of the time the arbitrators were to meet. 2d. It does not appear that the original referees disagreed, before a third person was appointed, or that he acted only after such disagreement.

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The award is in general terms; it sets out neither the submission, notice, or any disagreement. It states them to be referees, and the appointment of *Robert C. Long*, as a third person, &c. and it is signed by all three.

It has not been contended, that it is necessary to state those facts in the award, but that they must be proved, and unless proved, the award will not be enforced by the court.

That the parties ought to have notice of the time of meeting, is a position so strongly supported by common justice, that it would seem not to require the aid of authorities. Every man ought to have an opportunity afforded him to be heard in defence of his rights; and it is with surprise we find in one case, *Lord Hardwicke* is made to say, notice is not necessary. 3 *Atk.* 529. This opinion, however, is overruled by many authorities. In *Kyd on Awards*, 95, it is stated, "when the person to whom the parties have agreed to refer the matters in dispute, has consented to undertake the office, he ought to appoint a time and place for examining the matter, and give notice of such appointment to the parties, or their attornies." So in 96—"The arbitrators may adjourn from time to time, giving notice, as at first, of the time and place of every subsequent meeting." And in 101—"If an umpire is chosen, he must also give notice to the parties of the time and place of meeting. See also *Caldwell on Arbitration*, 45. *Falcorer vs. Montgomery, et al.* 4 *Dallas*, 232.

It is equally clear, the original referees may choose the third person before they disagree, and this course is recommended by some of the judges. *Kyd*, 87. *Caldwell*, 40. *Roe vs. Doe*, 2 *Term Rep.* 644, 645. *Harding vs. Watts*, 15 *East*, 556.

Whether *Long* acted before or after the disagreement of *Collins* and *Jamison*, is unimportant in this case. Had the award been signed by *Long*, and only one of the original referees, it would then have been necessary to consider that question; here it was signed by all three of them. The submission did not authorise an umpire to be appointed; for an umpire, technically speaking, when he takes charge of the case, takes it exclusively to himself, and divests the original arbitrators of all power to proceed in it, and the award is to be made by him alone. 3 *Blk. Com.* 15. The submission in this case is different. If *Collins* and *Jamison* could not agree, they were to choose a third person. Their

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power to proceed did not cease upon this appointment; but they were to go on conjointly with him, and the award of all three, or any two of them, was to be binding on the parties.

If they disagreed, before *Long* acted, there can be no doubt the award was good, because it was strictly within the terms of the submission. If they had not disagreed, it would be the award of the two original referees. Being signed by *Long* would be surplusage, and would not vitiate it. *Caldwell*, 42. *Soulsby vs. Hodgson*, (S. C.) 3 *Burr.* 1474. 1 *Wm. Bl. Rep.* 463. 4 *Taunt.* 232. 2 *John. Ch. Rep.* 353. These authorities establish the position, that "where arbitrators, having chosen an umpire, afterwards join with him in making the award, this does not vitiate it; since in law it is the award of the umpire *only*, who may take what advice, opinion or assessors, he will"—and *e converso*, the umpire signing the award, does not vitiate it; it would be the award of the original referees, who might take what advice, opinion or assessors, they choose.

The consideration of those questions, however, is not necessary in deciding the case now before us, because the defendant did not pursue the course below, to bring them properly before that court. The award is silent, both as to notice and the disagreement of the referees, and of course these objections do not appear on the face of it. If they can be established, it must be by testimony *de hors* the award, and in that case, an application to set it aside, must be founded on affidavit. *Caldwell*, 177, 178. 2 *Tidd's Prac.* 762, 835. *Dick vs. Milligan*, 2 *Ves. jun.* 28. In this last case, it is said, "if you proceed upon any thing arising on the face of the award, compared with the proceedings in the cause, by which it appears there is something in the award which ought not to be there, or something omitted which ought to be in it, that is proper matter for exception. Any thing *de hors* the award must come upon affidavit. This doctrine is confirmed by a decision of this court at June term 1823, in the case of *Cromwell vs. Owings*, (*ante* 12, 13.) No affidavit appears in the record, and the motion was not properly before the court.

There is nothing in the objection, that the decree was passed without setting the cause down for hearing. The court state the cause then stood *ready* for hearing, and we will presume all pre-requisites were complied with.

DECREE AFFIRMED.

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ALLEGRE vs. THE MARYLAND INSURANCE COMPANY.

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Policies of insurance, charter parties, or, instruments of like nature, may be explained by parol evidence of the usages of the trade to which they relate, whether such usages regard the course of the voyage or not. Parol evidence of usage admissible to prove the meaning of the words in a policy that in case of loss, the same was to be paid in ninety days after proof and adjustment thereof.

An action cannot be maintained on a policy containing the above clause, about proof and adjustment of loss, unless such proof is first exhibited to the underwriters.

The proof to be thus exhibited in the case of a partial loss, is the protest, bill of lading and invoice, or such equivalent proofs as the nature of the loss admits of, that being the kind of proof usually required.

Whether in the case of a partial loss on the cargo in a valued policy, the assured is to be indemnified according to the valuation in the policy, or to the actual value of the cargo at the port of shipment? If the cargo, however, be a mixed one, no adjustment can be made without proof of its value at the port of purchase.

If the underwriters in a policy having the clause relating to proof of loss and adjustment, before stated, inform the assured that they will not pay his loss, without saying that it is because of the want or deficiency of the preliminary proof, they will be held to waive the necessity for the proof.

If the underwriters refuse to pay the loss of the assured, his right of action immediately accrues, although there be a clause in the policy that payment is not to be made until ninety days after proof and adjustment of the loss, and that in case of dispute that the same be settled by arbitrators.

The agreement to arbitrate does not divest courts of justice of their jurisdiction.

The defendant's counsel prayed the opinion of the court, that the plaintiff was not entitled to recover unless he proved that he had exhibited to the defendants, before instituting his suit, as a part of his preliminary proof, his invoice, the usage of producing the invoice was not denied by the counsel for the plaintiff, the court gave the opinion, to which the plaintiff's counsel asked leave to except. While drawing the exception, they were asked by the court if they intended to go on with the cause, or whether this opinion would end it; they replied that it would; when the court, with the consent of the counsel on both sides, discharged the witnesses. Before the jury retired, the plaintiff's counsel denied the usage of exhibiting the invoice, and refused to insert it in the exception; the counsel on the other side then called a witness, who had been discharged, by whom they proved the usage. The plaintiff's counsel offered then to go on with the cause, and to prove that the invoice had been in fact exhibited; but the court refused to permit them, and compelled them either to be nonsuited, or to take a verdict for the defendants. Held that the court erred.

APPEAL from *Baltimore* county court. Covenant on a policy of insurance. Plea, *Non infregit conventionem*. The facts are sufficiently stated in the opinion of this court. The cause was tried in the court below, before *Archer, Ch. J. and Hanson and Ward, J.* and came to this court on three bills of exceptions, taken to their opinions by the appellant, who was the plaintiff below.

The case was argued before *BUCHANAN, Ch. J. MARTIN, STEPHEN, and DORSEY, J.*

Mayer, J. Glenn and Taney, for the Appellant, contended, 1. That no preliminary proof of loss was necessary. 2. That parol evidence was inadmissible to prove what kind of preliminary proof had been usually required. 3. That no usage was admissible to show that the proof required was of a higher nature than would be necessary to sustain an action on the policy in a court of justice. 4. If preliminary proof was required at all, it had been waived by the appellees, or had been duly exhibited; and 5. That the court erred in refusing to permit the plaintiff, under the circumstances stated in the third exception, to produce evidence that such proof had been given.

On the first point, they cited *Shep. Touch.* 380, tit. Obligation. 2 *Marsh. on Ins.* 617.

On the second and third points, *Noble vs. Kennoway, Doug.* 513. *Heaton vs. Rucker, 3 Burr.* 1707. *Park on Ins.* 470. *Phillips on Ins.* 17, 312, 313, (note.) *Bean vs. Stupart, Doug.* 12, (note 4.) *Mumford vs. Hallett, 1 Johns. Rep.* 433; & *Ogden vs. The Col. Ins. Co. 10 Johns. Rep.* 273.

On the fourth point, *Vos vs. Robinson, 9 Johns. Rep.* 192. 2 *Marsh.* 716, (note.) *Talcat vs. The Marine Insur-*

ance Co. 2 Johns. Rep. 130. Haddow vs. Parry, 3 Taunt. 1825.
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Lloyd, and Wirt, (Attorney General U. S.) for the Appellees. They referred, on the first point, to Lenox vs. The United Insurance Co. 3 Johns. Cas. 224. 1 Marsh. 138, 291. Park, 116. 2 Marsh. 631. Munson vs. The Marine Ins. Co. 4 Mass. Rep. 116.

On the second point, *Johnson vs. The Col. Ins. Co. 7 Johns. Rep. 315. 1 Marsh. 226. 2 Marsh. 707, (note.) Ibid 672. Phill. on Ins. 499.*

DORSEY, J. delivered the opinion of the court. The counsel on both sides, in the argument of this cause, have displayed great professional ability, and much labour of research; and the deep interest which the commercial part of our community take in subjects of this nature, have induced the court to give the matters in controversy their most serious consideration. In the progress of the trial in Baltimore county court, three bills of exceptions were taken by the counsel for the plaintiff, the first of which presented the following statement of facts on his part: "That on the 23d of May 1820, he obtained insurance on the cargo of the brig *Eugene*, from *Rio de la Plata* to *Havanna*, valued at \$6000; the policy of which being for the most part in the usual form, contained the following clause: "And in case of loss, such loss to be paid in ninety days after proof and adjustment thereof, the amount of the note given for the premium, if unpaid, being first deducted; and it is mutually agreed, that if any dispute shall arise relating to a loss on this policy, it shall be referred to two persons, the one to be chosen by the assured, the other by *The Maryland Insurance Company*; which two persons shall have power to adjust the same; but in case they cannot agree, then those two persons shall choose a third, and any two of them agreeing, their determination shall be obligatory on both parties." That on the 8th of July following, the cargo, consisting of one hundred and six mules and four jack asses, was laden on board, the brig being then safe and staunch; and whilst on the voyage, by one of the perils insured against by the policy, all the mules, save twelve, were lost. That a protest was made in due form, sworn to by the captain and three of the crew, detailing

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minutely all the particulars of the shipment of the cargo on board the brig, her sailing on the voyage, and the loss sustained as aforesaid. That this protest, together with the usual bill of lading, were delivered to the defendants by the plaintiff, as his preliminary proofs, before the bringing of this action. Sometime after the receipt whereof by the defendants, they caused the following letter to be written to the plaintiff:

"Mr. J. B. Allegre,

Sir—I am instructed by the directors of this company, to inform you, that the claim you make for the insurance on the cargo of the brig *Eugene*, has had their particular attention, and also that of Mr. *Pinkney* and Mr. *Purviance*, the result of which is, that the company decline the payment, under a persuasion, sanctioned by those gentlemen, that the company are not answerable for the same.

Very respectfully, &c.

John Hollins, President."

That after this testimony had been given, the defendants offered to prove, that it was the "uniform and established usage for a vessel sailing from the port of shipment, to have on board a bill of lading, and invoice of cargo, showing its prime cost and value, and that such invoice is a document which the insurer is in the habit of demanding, and the assured of producing, on the settlement of all partial losses, although such losses may be claimed under a valued policy;" to the admission of which proof, the plaintiff's counsel objected; but the court overruled the objection, and permitted the testimony to be given; to which opinion the plaintiff excepted. In this case the plaintiff, having omitted to abandon, and claim for a total loss, brought the present action of covenant, to recover for a partial loss. Is there error in permitting this usage to be proved, to explain the meaning of the words "proof of loss and adjustment thereof?" is the question arising on this bill of exceptions. It has been conceded throughout the argument, that usages of trade are admissible in evidence to explain the meaning of expressions contained in policies of insurance, charter parties, or instruments of like nature. But it was contended that such proof could only be received of usages, which relate exclusively to the course of the voyage. In support of this assumed distinction, no decision has been adduced, not even an *obiter dictum*; nor has any reasons been

submitted to show why the terms of a policy of insurance may not be as well explained by any other commercial usage as by usages of trade, applicable only to the course of the voyage. For solemn adjudications to the contrary, see the cases of *Cutter vs. Powell*, 6 T. R. 320. *Mason vs. Skurray*, 1 Marsh. Ins. 226; and *Gibson vs. Colt* and others, 7 Johns. Rep. 385. In none of which cases were the usages proved, as explanatory of the terms of the contract, usages of trade which related to the course of the voyage.

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The *second* bill of exceptions contains the facts proved by the plaintiff, and the proof on the part of the defendants of the usage mentioned in the *first* bill of exceptions; which usage was proved by *David Winchester*, president of *The Baltimore Insurance Company*, and well acquainted with the mode of adjusting losses on policies of insurance. Whereupon the plaintiff, by his counsel, prayed the court to instruct the jury, that no proof is required on this trial that he exhibited to the defendants, before instituting this suit, any preliminary proofs, or that if such proofs be necessary, the protest and bill of lading are sufficient preliminary proofs, or that said letter from the defendants was a waiver of such proof. Which direction the court refused to give; and to such refusal the plaintiff excepted.

It is a rule of law, that in construing written instruments the court should give some meaning and operation to every clause and word of the instrument, provided it can be done consistently with the intentions of the parties. Let this rule be applied to the *first* branch of this exception, viz. Is it necessary, on a trial at law, on such a policy as the present, for the assured to prove that he exhibited any preliminary proofs to the insurer before he commenced his action for indemnity for a partial loss. It appears somewhat a matter of surprize, that the human mind could be prevailed upon to doubt on this subject. In support of the affirmative of this proposition, the language of the policy is so explicit, the intentions of the parties so obvious, that it almost becomes a self-evident proposition. By sanctioning the negative, you reject, as inoperative and superfluous, all that is said about "proof of loss," contrary to every known principle of construction.

The *second* branch of this exception, viz. "Was the exhibition to the insurer of the protest and bill of lading suf-

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ficient preliminary proofs?" is a question, the answer to which is by no means so obvious. There is not that perspicuity and precision in the language used, which silence all doubt as to the meaning of the parties. The requisition of "proof of loss" is distinct and undeniable, but the obligation of the assured, to furnish the customary proofs of interest, and the quantum of loss, which form the basis of an adjustment, is certainly not so apparent. But when we advert to the nature and circumstances of the contract itself, the manifest design of the parties, in introducing this clause, that all adjustment of losses should be made by themselves, the sedulous precaution with which they have endeavoured to provide against all litigation, by declaring that if they cannot adjust the loss among themselves, that arbitrators shall be chosen for that purpose; that in no event, within the contemplation of the parties, was the assured to be authorised to sue at law. The court think that the true construction of this clause of the policy is, that the insured is bound to offer, as his preliminary proofs, such documentary proofs in his possession as are usually required in adjusting a partial loss; that is, the protest, bill of lading and invoice, or such equivalent proofs as the nature of the case is susceptible of. These proofs remain with the assured only, or his agents; the burthen of producing them therefore rests on him.

The court forbear to express any opinion on the question so warmly contested in the argument, "whether, in the case of a partial loss on the cargo in a valued policy, the assured is to be indemnified according to the valuation in the policy, or the actual value of the cargo at the port of shipment?" Let the question be settled as it may, if the cargo be a mixed one, proof of its actual value at the port of purchase must be produced, before an adjustment upon either principle can be made.

"Was the letter of the defendants to the plaintiff a waiver of such preliminary proofs?" is the last question arising on this exception; and the court are of opinion that it was. Good faith and fair dealing is of the very essence of all contracts of insurance, and should pervade every proceeding under them. If then the insurer, in writing this letter, intended to reject the claim of the insured, merely because the invoice had not been produced, the writing of this letter was a fraud upon the assured, a de-

ception utterly inconsistent with the spirit and meaning of the contract; a species of conduct which this court will never impute to the underwriters, while their acts are susceptible of a different interpretation. If they intended to refuse payment of the loss, because the invoice, a customary part of the preliminary proofs, had not been laid before them, it was their duty so to have informed the insured; and their failure to do so, and the writing of such a letter, was a waiver of all further preliminary proofs. The letter itself is a plain unequivocal notification to the plaintiff, that his claim for indemnity will not be adjusted by the defendants; and by necessary implication gives him to understand, that all further offers of preliminary proofs would be useless.

The agreement to arbitrate does not oust courts of justice of their jurisdiction. The parties then stand in an attitude not contemplated by them. Their stipulation, that the loss is only to be paid in ninety days after proof of loss and adjustment, looks only to the case of an amicable adjustment by themselves. When then by the acts of the defendants that cannot be made, the plaintiff is absolved from the operation of this stipulation, and his right of action immediately accrues. His case comes completely within the principle settled in the case of *Ogden vs. The Columbia Insurance Company*, 10 Johns. Rep. 273, where, under a proviso in the policy, that the assured should not abandon until six months after capture and detention, the condemnation taking place in one month after capture, the court determined, that the right to abandon was immediate upon the condemnation, a new case having arisen not contemplated by the parties in their contract.

The *third* bill of exceptions presents a new point to the consideration of the court, not at all involving any question as to the merits of the matters in controversy between the parties in the cause. The bill of exceptions states, that after the plaintiff had given his evidence, as stated in the *first* bill of exceptions, and having declared his intention to relinquish the claim for a total loss, and to claim in this action for a partial loss, the defendants, by their counsel, prayed the court to instruct the jury, that according to the covenants contained in the policy, in order to maintain the present action, the plaintiff was bound to prove, that previous to the institution of this suit, he had exhibited to

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the defendants, among the preliminary proofs of loss, and for the purpose of adjustment, the invoice showing the prime cost of the cargo, for the loss of which he was now claiming; the defendants' counsel insisting in argument, that in a case like this, it was the constant usage of insurance companies, among such preliminary proofs, to require the production of such invoice, and of the insured to produce it, which usage was not denied by the plaintiff's counsel in argument, and by not being denied, was supposed by the court, and defendants' counsel, to be admitted; the court accordingly instructed the jury, that it was incumbent on the plaintiff to show, that among the preliminary proofs he had exhibited the said invoice of cargo, and unless he should prove this fact, he would not support the present action. To this instruction the plaintiff, by his counsel, declared that he would except, and proceeded to draw his bill of exceptions; while engaged in drawing it, the plaintiff's counsel were asked by the court, whether it was their intention to go on with the cause, or whether this instruction would put an end to it? To which the counsel answered, that it was not their intention to go on with the cause; whereupon the court, with the concurrence of the counsel on both sides, openly discharged the witnesses who were in attendance on the part of the defendants, and plaintiff also; the witnesses being discharged, and having left the court house, but the jury remaining undischarged in their box, the plaintiff's counsel denied the usage before stated, and refused to have it inserted in the bill of exceptions; whereupon the defendants' counsel, for the purpose of satisfying the plaintiff's counsel and the court, that it ought to be inserted in the bill of exceptions, sent for *David Winchester*, a resident of the city of *Baltimore*, and one of the witnesses who had been so as aforesaid discharged, but who had been previously summoned for the purpose of giving evidence in the cause, who did expressly prove the usage as above stated; after which the plaintiff's counsel offered to proceed with the cause, and to adduce evidence that the said invoice had been exhibited to the underwriters among the preliminary proofs, to wit, on the 23d day of May, in the year 1820; but the court, under the circumstances of the case, refused to permit the cause to proceed, and put it to the counsel for the plaintiff either to submit to a nonsuit, or to a verdict for the defendants; from which opinion of the court the plaintiff excepted.

Had the facts been inserted in this bill of exceptions, which actually occurred in the court below, as stated by the defendants' counsel in the argument of this case, the conduct of that court might have appeared free from all error or ground of exception. But this court must form their opinion upon the facts as stated in the record, and cannot look beyond it. In this case then, as thus presented to their consideration, the court think there is error in the proceedings of the court below. The discretionary powers of courts of law are confined within fixed and well established limits, and are to be exercised to further, not prevent, the administration of public justice. The county court had not a right of their own mere motion, (and no other motive for their conduct here appears,) to refuse permission to the plaintiff to proceed in the trial of his cause; the right to such objection belonging to the defendants, and not the court. In the exercise of this right, the defendants must state the grounds of their objection; of the sufficiency of which the court are to judge. If they had alleged the absence of their witnesses, occasioned by the proceedings which had taken place, they must have stated what they expected to prove by them, that the plaintiff, if he sees fit, may admit the facts, and proceed with the trial; and should he refuse to make the admission, it would then become the duty of the court to put him to his election, either to consent to withdraw a juror, take a verdict against him, or nonsuit his case.

The court concur with the opinion of the county court on the *first* bill of exceptions, and on the two first divisions of the *second* bill of exceptions, but they dissent from their opinion on the last alternative of the *second* bill of exceptions, and from the opinion given on the *third* exceptions.

Let the judgment therefore be reversed, and a *procedendo* awarded.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

FENWICK'S Adm'r. vs. FORREST.

JUNE.

APPEAL from *Saint Mary's* county court. This is the same case reported in 5 *Harr. & Johns.* 414, and sent back

dian of the children of the deceased, in an action against such guardian by a third person
In an action of covenant by A against B, on B's warranty to defend certain slaves sold by him to A, parol evidence is admissible to prove a paramount title in another person to such slaves
Where no objection is taken to the sufficiency of evidence offered at the trial, the court will not in-
struct the jury as to the sufficiency of such evidence to prove a particular fact

An executor is a competent witness to prove transactions between himself and the guar-
person

sold by him to A,
slaves

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to the county court for a new trial under a writ of *prodedendo*.

1. At the new trial in the county court, the plaintiff, (now appellee,) read in evidence the articles of agreement, and the record from *Baltimore* county court, which were given in evidence on the former trial, and then gave in evidence, that the negroes, in the articles of agreement mentioned, were the descendants of a negro woman called *Sall*, once the property of *Nicholas Sewall*. That the said *Sewall*, sometime between 1800 and 1803, informed the witness, that after *Sall's* intermarriage with *David Sommerville*, he agreed that she should attend her husband to *Baltimore*, and that if he would pay him, after a certain time which the deponent did not now recollect, a sum of money, the amount whereof the deponent does not recollect; that *Sall* should be the property of her husband. That *Sall* left the said *Sewall's* house, and went to *Baltimore* with her husband. The plaintiff then gave evidence, that between 1809 and 1813, *David Sommerville*, and *Nicholas Sewall* in his life time, had an interview, in which *Sommerville* expressed his fears that his wife might be interfered with as a slave and runaway; and that it was then understood between the said *Sommerville* and *Sewall*, that the contract, in relation to the said negro woman, was affirmed, in consideration of having raised two children which he was either to send home, or had sent home, to the said *Sewall*, and a sum of money which was then paid. The defendant then gave in evidence, that the said negroes, in the agreement mentioned, were paid over by *Raphael Neale* and *Lewis Ford*, executors of *Nicholas Sewall*, to the defendant as guardian to the children of the said *Nicholas Sewall*. Whereupon the plaintiff offered to give evidence by *Raphael Neale*, one of the executors as aforesaid; to the competency of which witness to give evidence the defendant objected; but the court, [*Stephen*, Ch. J.] would not sustain the said objection, but was of opinion that the said witness was competent to give evidence, and did permit him to give evidence. The defendant excepted.

2. The plaintiff then proved by *Thomas Lynch*, a witness sworn on his part, that between the first and the tenth of May 1817, six negroes were brought on board his vessel lying at *Baltimore*, and were brought by him to the house of the defendant, and delivered to him, and claimed

by him as his property; that he afterwards heard the defendant say, that some of those negroes were in dispute in *Baltimore*, and that the plaintiff was concerned. He then gave in evidence, by *Peter Gough*, that the defendant informed him that he was present at a conversation between Gen. *Winder* and the plaintiff in August 1817, in which the plaintiff instructed Gen. *Winder*, who had appeared as counsel in the action of replevin before mentioned, that he would not authorise him any longer to appear at his instance and request to defend the said writ. By consent of the parties, a record of the proceedings in the court of appeals, on the former appeal, was given in evidence.

The jury then retired, and after some time engaged, caused the following paper to be transmitted to the court. "The jury will thank the honourable court to instruct them which of the parties was legally bound to defend the suit of replevin of *Sommerville vs. Fenwick* in the record mentioned." Whereupon the court, [*Stephen*, Ch. J. and *Platzer*, A. J.] by consent of counsel engaged in the cause, ordered the jury to the box, and gave them the following direction and instruction: That the plaintiff in this cause not being a party to the action of replevin, in the said record mentioned, could not defend said action, and was not bound to do so. That *Fenwick*, the defendant in the said action of replevin, and the defendant in this cause, was not bound to defend the said action of replevin, unless he thought fit, but if he did not defend the same, he would be liable to the plaintiff in this action, if the plaintiff prove a paramount title in the plaintiff in the said action of replevin, by parol or other evidence. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The appellant having died after the appeal, his administrator appeared. The cause was argued before *BUCHANAN*, Ch. J. *EARLE*, *MARTIN*, and *ARCHER*, J. by

Causin and *F. S. Key*, for the Appellant, and by
Magruder and *Taney*, for the Appellee.

MARTIN, J. delivered the opinion of the court. This action was founded on a covenant, by which the defendant warrants and defends the negroes mentioned in it, against all persons whatsoever, to be the property of the plaintiff; and the breach assigned is, that they were the property of

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one *Sommerville*, who dispossessed the plaintiff of them. In a former trial of this case in 1822, this court decided that the plaintiff might sustain his action, by proving a paramount title to the negroes in *Sommerville*, and that fact might be established, either by a recovery in a court of law, or by any other written or parol evidence. In the second trial the same testimony was offered to the jury that had been submitted to them in the first, and also additional parol evidence, intended to show a paramount title in *Sommerville*. No objection whatever was made by the defendant to the competency of this evidence, (except that given by *R. Neale*,) nor was any prayer preferred to the court upon its sufficiency to sustain the action. After the jury had retired, a difficulty occurred to them, and by the consent of the parties they returned to receive the instruction of the court. The question propounded by the jury was, who was bound to defend the replevin in *Baltimore* county court? The court directed them, that neither the plaintiff nor defendant was bound by law to defend that suit, but that the plaintiff was not confined to that testimony alone, to sustain his action. If he could prove a paramount title in *Sommerville*, by any other evidence, written or parol, it was sufficient. We see no error in this instruction, it is in substance, if not literally the law, as declared by this court in the first trial in 1822.

It has been contended, that the evidence submitted to the jury was not sufficient to prove a paramount title in *Sommerville*, and it was error in the court that they did not so instruct them. No objection was offered to its sufficiency at the trial. Had an application been made to the court upon that question, then, and then *only*, was it their duty to act upon it.

The bill of exceptions appeared to be almost abandoned in the argument. The record certainly does not afford proof to prevent *R. Neale* from being a competent witness.

JUDGMENT AFFIRMED.

JUNE.

KEY'S EX'T. vs. PARNHAM.

A written agreement cannot be explained by a subsequent letter of one of the parties.

Where, upon the face of an agreement, one of the contracting parties appears plainly to be acting as the agent of another, the stipulations of the agreement operate solely to bind the principal, unless it manifestly appears that the agent intended to superadd or substitute his own responsibility for that of his principal.

An agreement, that "I have this 9th January, 1817, hired of *G. P.* the following slaves, for the use of *R. K. H.*, to give \$80 as wages for each of the slaves, and to furnish them with all necessary clothing and food, (then stating the names of the slaves,) and signed *F. K.*—Held, not to bind *F. K.* personally.

APPEAL from *Saint Mary's* county court. Action of *Assumpsit*. The declaration contained four counts—1.

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That *Key*, the defendant's testator, (now appellant,) had hired of the plaintiff, (the appellee,) sundry slaves for the use of *R. K. Heath*, in consideration whereof, *Key* then and there, in writing, undertook and faithfully promised the plaintiff to pay him \$80 for each and every slave, amounting in the whole to \$480. 2. That *Key* was indebted to the plaintiff for the hire and wages of sundry slaves, &c. 3. *Quantum meruit* for the hire of slaves, &c. 4. That *R. K. Heath* was indebted to the plaintiff in \$480, in consideration of the premises; and that the plaintiff, at the request of *Key*, would forbear and give time to *Heath* for payment until the 1st of January 1818. *Key* undertook and promised to pay the plaintiff on that day, &c. The defendant pleaded *non assumpsit testatoris*. At the trial, the plaintiff offered in evidence the following written agreement: "I have, this 9th of January 1817, hired of *George Parnham*, Esq. the following six negro men, for the use of *Richard Key Heath*, of *Baltimore* county, and for and during the present year, and agree, on behalf of the said *Heath*, to give eighty dollars as wages for each of the said negroes, and to furnish them with all necessary clothing and food, viz. *Juba, Davy, James, Richard, Michael* and *Shadrick*.
Philip Key."

Which was admitted to be in the handwriting of the testator. And proved that the slaves mentioned in said writing were sent to *Heath*, and hired by him agreeably to the terms of the agreement. The plaintiff also produced the following letter, admitted to be in the handwriting of the defendant's testator: "Dear Sir, Mrs. *Key* is anxious I should hire your sister's woman for Mrs. *Heath*. If then she will take no less than \$25, and the woman can go up with the other hands, you will send her up, and I will be answerable for the wages, clothing and food. The woman will have a tender, good mistress; and indeed I know that great care will be taken of the whole of them.

P. Key.

Indian Town, 12 January, 1817."

The defendant then produced a witness, who proved that *Key* showed to the witness a letter from *Heath*, requesting *Key* to hire for him a large number of hands. This was in the winter 1817, and before the hiring of the negroes mentioned in the agreement; the price of the hands was not limited, but *Key* was requested not to exceed \$80 each,

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The defendant also proved, that *Heath* resided, at the time of the agreement, in the neighbourhood of *Baltimore*, and had done so long before and did long after; and that *Heath* was always, up to the year 1819, generally known as a man of character and of high pecuniary credit. That the intestate, at the time of making the agreement, communicated to the plaintiff that the slaves were for the use of *Heath*, and that he was authorised by *Heath* to hire them; and further, that *Heath* had been at *Chaptico*, in *Saint Mary's* county, the year before the agreement was made, and hired a good many slaves in the said county. The defendant then prayed the opinion of the court to the jury, that the letter of *Key*, the defendant's testator, was not evidence in the cause, and that said testator was acting as agent in making said agreement, and therefore was not liable in this action. But the court, [*Plater A. J.*] refused to give this opinion, and allowed said letter to be read in evidence to the jury; and further directed the jury, that it was the opinion of the court, from the face of the agreement, and the other evidence, that the plaintiff was entitled to recover. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant appealed to this court.

The cause was argued before *BUCHANAN*, Ch. J. *EARLE*, *MARTIN*, *STEPHEN*, *ARCHER*, and *DORSEY*, J.

Ashton, the Appellant, in person, relied upon *M' Donough vs. Templeman*, 1 *Harr. & Johns*. 156, and *The Mechanics Bank vs. The Bank of Columbia*; 1 *Wheat*. 326.

Stone, for the Appellee, submitted the case to the court without argument.

DORSEY, J. delivered the opinion of the court. After stating the facts, and the opinion of the court below, he proceeded:

To this opinion of the court the defendant excepted; and, it appears to this court, not without cause. Let it for the moment be admitted, that matter *de hors* the written instrument itself may be resorted to in explanation of the meaning of the agreement of the 9th of January, yet the letter of the 12th of January cannot be received for that purpose; it is no part of the *res gesta* intended to be contained in the agreement on which this action has been instituted; it is a proceeding subsequent in point of time, relating entirely to a different subject, and being irrelevant

to the matter in issue in the cause, is wholly inadmissible as evidence before the jury.

In refusing the prayer of the defendant as to the agency of the testator, and in instructing the jury that the plaintiff was entitled to recover, this court think that the county court also erred. Wherever, upon the face of an agreement, a party contracting plainly appears to be acting as the agent of another, the stipulations of the contract are to be considered as operating solely to bind the principal; unless it manifestly appears by the terms of the instrument that the agent intended to superadd or substitute his own responsibility for that of his principal. In such case, and in such case only, if acting within the scope of his powers, is he personally answerable. No such intention is manifested by the present agreement; it states that the negroes were hired for the use of *Richard K. Heath*, and the stipulation to pay is made, in so many terms *on his behalf*; thereby repelling any inference that might otherwise be drawn, to involve him personally on this contract. A much stronger case than the present was decided by the court of appeals of this state at June term, 1804, reported in 1 *Harr. & Johns*. 156, *M'Donough vs. Templeman*. There, although in the introductory part of the agreement the defendant describes himself as acting on behalf of his principal, yet when he stipulates for the payment of the hire of the negroes, without any express reference or allusion to his principal, he binds himself in precisely the same terms that he would have used had it been the intention of the parties that he alone, and not those for whom he contracted, was to be bound for the debt. Yet the court of appeals, looking to the intentions of the parties, as deducible from the relative situation in which they stood, determined that the engagements of the defendant, although by the expressions used involving himself only, were to be understood as referring to his representative character, and not as inducing any personal liability on him. In the case at bar, the defendant's testator, in the very clause of the agreement on which this action is founded, states in express terms, that he agrees *on behalf* of his principal to pay; thereby evincing the most unequivocal intention not to pledge his own personal responsibility.

The court dissent from the opinions given by the court below, and therefore reverse their judgment.

JUDGMENT REVERSED.

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LAMBORN vs. MOORE.

Appeal from Harford county court. This was a special action on the case. The declaration stated, that the defendant, (now appellee,) on the 19th of August 1817, was sheriff of Harford county, and as such had sundry executions against the property of the plaintiff, (now appellant,) placed in his hands for collection, and which were issued out of Harford county court, on sundry judgments therein rendered, against the plaintiff, in favour of a certain *Buckler Bond*, amounting in the whole to about the sum of \$4500, and which executions the defendant had laid upon the plaintiff's property, and did then and there proceed to advertise the same for sale at public vendue, to satisfy said executions, to wit, on the said 19th of August aforesaid. And that thereupon, the plaintiff, in order to prevent his said property from being sacrificed and sold for less than its value, did then and there, at the time and place of said sale, agree with a certain *John Watson*, to bid in said property for the plaintiff, and to endeavour to obtain from the defendant, until the Monday then next following, to pay the amount of the money due upon said executions. And the plaintiff averred, that the said *Watson*, in conformity with said agreement, did at the sale aforesaid, bid in the said property for him, and upon his account, for the sum of \$5000, as he understood, and then and there verily believed. The plaintiff further averred, that after the said sale was over, the defendant did then and there agree to give the plaintiff, and the said *Watson*, until the Monday then next following, to raise the money and pay said executions. Yet the defendant, not regarding his said agreement and undertaking, but intending, craftily and fraudulently, to deceive and injure the plaintiff in this particular, and to prevent the plaintiff from retaining said property, or from selling it for what it was fairly and reasonably worth, and of paying said executions out of the proceeds thereof, and of retaining the balance for himself, but that the same might be held and retained by the said *Watson*, by virtue of his bid, for a small part of its actual value, to the great prejudice and injury of the plaintiff, the defendant did then and there, at the county aforesaid, on the day and year last aforesaid, secretly collude with, counsel, advise and aid the said *Watson*, to hold said pro-

A *fi. fa.* or a judgment obtained by *B vs. L.* was placed in the hands of *M*, a sheriff, and by him laid upon the land of *L*. At the sale, *L* perceiving that the land would not sell for its real value at that time, entered into an agreement with *W*, that he should bid it off, for account of *L*, with the consent of *M*, to enable *L* thereby to gain time to raise the amount of the judgment. *W* did bid it off for less than its value, with *M*'s consent, but conceiving the design of converting the purchase to his own profit, entered into a fraudulent agreement with *M*, to retain the land for their mutual advantage, and then refused to relinquish it to *L*, who had raised money enough to satisfy the amount of the judgment. In an action on the case by *L vs. M*, the sheriff, for the breach of this agreement—*Held*, that the agreement was within the statute of frauds, and that the plaintiff could not recover.

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erty by virtue of his said bid, that thereupon and thereby they the defendant and *Watson*, might sell the same for a larger sum, to wit, for the sum of \$8000, which had been offered for it previous to said sale, upon their own account, and for their own benefit, and share the profit thereof between them. And the plaintiff further averred, that he did obtain the means of paying said executions to said *Bond*, for which the said property had been sold, by the time agreed upon with the defendant, and did apply to the defendant to receive the full payment thereof with the said *Bond*, and as he the said *Bond* had agreed, and was willing and desirous to receive the same, and did require that the said executions should be discharged, and the property released; but the defendant then and there totally and absolutely refused to receive the money for said executions, as the said *Bond* had agreed with the plaintiff, although thereto requested by the plaintiff and the said *Bond*, to whom the whole of the money on said executions was due, and to be paid over by the defendant; but the defendant did then and there claim said property, and hold the same for the said *Watson*, by virtue of his said bid at the sale aforesaid, whereby the plaintiff was deprived of the power of selling said property for a much larger sum which had been offered for it, and of benefiting himself with the balance thereof, after paying the executions aforesaid; but by reason thereof, he totally lost the same, and was otherwise greatly injured, and entirely broken up in his business, and rendered unable to pay his debts; and by reason thereof, was afterwards compelled to petition for the benefit of the insolvent laws of this state. And the plaintiff further averred, that the defendant afterwards did return the property sold to the said *Watson*, and satisfied said executions; and that the defendant procured himself to be made trustee of the plaintiff, for the benefit of his creditors, and did afterwards proceed, at sundry times, to advertise all the plaintiff's right, title and interest, in and to said property, for sale, at public auction, and after the said sale to the said *Watson*, and did fraudulently cause the plaintiff's right and interest in said property to be sold for the sum of \$300. By reason of all which premises, the plaintiff had been greatly injured, and suffered great loss and damage, to wit, the sum of \$5000, &c. The defendant pleaded *non assumpsit*, to

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which there was a general demurrer and joinder. The county court ruled the demurrer good, and that the defendant answer over. The defendant then pleaded not guilty, and issue was joined.

At the trial the plaintiff proved the several matters stated in his declaration; and the defendant proved, that the property, mentioned in said declaration, was land and real estate, and that the understandings and agreements in said declaration stated, had relation to said land and real estate, and to no other property; and also that the said understandings and agreements were not, nor were either of them reduced to writing, or any memorandum, or other writing, made of the same, nor was there any money paid for or on account of the same, or the said land, by the plaintiff, or by any one else for him, to the defendant. The defendant then prayed the opinion of the court to the jury, that the plaintiff was not entitled in law to recover. Which opinion the court, [*Hanson and Ward A. J.*] gave. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. EARLE, and STEPHEN, J.

Mitchell and Kennedy, for the Appellant, relied on the following points:

1. That a special action on the case can be sustained against any person who, with a fraudulent intent, induces the plaintiff to confide in a third person, and intrust him with his property, knowing at the time that such third person intends to cheat him out of such property.
2. That the property being land, the intervention of a parol agreement, as one of the means of the contemplated fraud, does not vary the case.
3. That the statute of frauds cannot be interposed by the defendant to protect him in this case.
4. That it was a violation of the sheriff's duty to make the purchase, as stated in the declaration.
5. That a debtor under execution has a right to redeem, and it is not imperative on the sheriff to sell.

On the *first point*, they cited *Pasley vs. Freeman*, 3 T. R. 51. *Hamar vs. Alexander*, 5 Bos. & Pull. 241. *Eyre vs. Dunsford*, 1 East, 327. *Hart vs. Tallmadge*, 2 Day,

381 *Burton vs. Loyd*, 3 *Esp. Rep.* 208; and *Russell vs. Clark*, 7 *Cranch*, 92.

On the second point—*Rob. on Frauds*, 104, 120.

On the third point—*Rob. on Frauds*, 130, 135, 137. *Strickland vs. Aldridge*, 9 *Ves.* 519. *Hamar vs. Alexander*, 5 *Bos. & Pull.* 241; and *Eyre vs. Dunsford*, 1 *East*, 327.

On the fourth point—*Mark vs. Lawrence*, 5 *Harr. & Johns.* 64. *Turner vs. Fendall*, 1 *Cranch*, 136, 137. 1 *Sellon's Pr.* 513. *Davoue vs. Fanning*, 2 *Johns. Chan. Rep.* 264, 269, 270; and *Ex parte Bennett*, 10 *Ves.* 381, 394. And

On the last point—*Edmunds vs. Watson*, 7 *Taint.* 5. 1 *Sellon's Pr.* 525; and *Simonds vs. Catlin*, 2 *Caine's Rep.* 61.

R. Johnson and Gill, for the Appellee, relied upon *Lamborn vs. Watson*, (*ante* 252.) *Elsee vs. Galward*, 5 *T. R.* 148, 151. 1 *Saund.* 312, (*note c.*) 1 *Chitty's Plead.* 133, 368. *Boring's Lessee vs. Lemmon*, 5 *Harr. & Johns.* 223. *Bull's Lessee vs. Sheredine*, 1 *Harr. & Johns.* 410; and *Barney vs. Patterson's Lessee*, (*ante* 182.)

EARLE, J. delivered the opinion of the court. This is an action on the case in nature of a deceit, and is grounded on the facts alleged and proved, that the lands of the plaintiff were sold by the defendant, as sheriff of *Harford* county, under sundry writs of *fieri facias*, issued on judgments obtained against him by *Buckler Bond*, and bid in at a sum, greatly below their value, by a certain *John Watson*, who, to prevent a sacrifice of his property, and gain time for the plaintiff, agreed with him to purchase the lands for his benefit. That after the sale was over, the defendant agreed to give the plaintiff and *Watson*, until the Monday next following the sale, to raise the money and pay the executions; that not regarding his agreement and undertaking, but fraudulently intending to deceive and injure the plaintiff, he colluded with, advised and aided *Watson*, to hold the property by virtue of his bid, that he and *Watson* might sell the same for a larger sum upon their own account, and for their own benefit, and share the profits between them; and that in execution of their fraudulent design, the defendant refused to receive the money for the executions offered to him by the plaintiff by the time agreed on, but claimed the property, and held the same for *Watson* by virtue of his bid, and afterwards returned the property sold to *Watson*, and satisfied the executions.

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The greater part of these facts were examined by this court, in deciding *Lamborn and Watson* at the last term; like this case it was in form an action founded on a deceit, but was clearly intended to recover damages for a fraud, in the nonperformance of what may perhaps be called a fair agreement between the parties. That agreement being a verbal one for the sale of land, was determined by the court to be within the statute of frauds, and by its operation, to be a void contract; and it was decreed, that the attempt to recover for the fraud, subsequently conceived and practiced, in withholding an execution of the agreement, was evasive of the statute, and could not avail. Can this action then, growing out of the same contract, be in law supported?

The defendant here was not a contracting party in the agreement anterior to the sale, but he is charged with secretly colluding with, advising and aiding *Watson*, to hold the property by virtue of his bid, that they might sell the same for a larger sum on their own account, and for their own benefit, and share the profits between them, and with retaining the property sold to *Watson*, and satisfying the executions. This is the gist of the action, and is in substance the same facts that formed the ground work of the suit against *Watson*. Notwithstanding the fraud that supervened, the nonexecution of the agreement by him was pronounced not to be actionable, and his counsellor, however reprehensible we think him, cannot be exposed to greater liabilities. To the adviser the same law must be meted as was measured to the advised. They are in *pari delicto*, and a higher punishment ought not to await the one than the other, and if the breach of *Watson's* contract is unsusceptible of being enforced for one purpose, it should be so deemed for every purpose. Whatever abhorrence, therefore, we may feel for the conduct of *Moore*, as portrayed in the record, we must decide, that the action against him is not supported.

There is one particular in which this case may be said to differ from that against *Watson*, although in our opinion it does not lead to a different result. *Moore* is charged with violating his agreement, to give the plaintiff and *Watson* until the Monday following the sale to raise the money, and pay off the executions, and it was insisted on the argument to be the foundation of this suit. But it evident-

ly cannot be so considered; and from the complexion of the case, is plainly an item of the deceptive conduct imputed to the defendant, as manifesting a disposition in him to aid *Watson* in defrauding the plaintiff. If it was viewed, however, as a substantive ground of action, we cannot see how it could be made to support the plaintiff's case. It is not an undertaking to the plaintiff singly, but to him and *Watson*, and the latter at least was not for exacting an observance of it.

We concur with *Harford* county court in the instructions given to the jury, and affirm the judgment.

JUDGMENT AFFIRMED

WILLIAMS vs. ELLICOTT.

JUNE.

APPEAL from the equity side of *Baltimore* county court. The facts appearing by the bill and answer, were these: On the 30th day of August 1819, the appellant was appointed provisional trustee for the benefit of the creditors of *Amos A. Williams*, under the act of assembly, entitled, "An act relating to insolvent debtors in the city and county of *Baltimore*," 1816, chap. 221. On the 15th October 1819, the appellee was appointed permanent trustee under the same law. Under an expectation that the party, applying for the benefit of the insolvent laws, would be enabled to make an arrangement with his creditors, whereby his application for such benefit would be withdrawn, the appellant, when called on by the appellee to deliver over to him the effects, &c. of the insolvent, declined to do so, and assigned, as a reason for such refusal, that the arrangement with the creditors was in progress, and that, when it was finally disposed of, the delivery would be made. In December 1819, the negociation ceased, the creditors having declined to accept the proposition of the debtor, under circumstances which, the appellant conceived, (as stated in his answer to the bill of complaint,) justified him in refusing to deliver the effects to appellee, until compelled to do so in due course of law. The appellant also alleged, as a cause of such refusal, that the *United States* were creditors of the insolvent, and that he would not deliver the effects, until the claim of the government was first satisfied thereout. The county court, after ratifying the payments by the ap-

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A provisional trustee is bound, when demanded, to deliver over to the permanent trustee the estate and effects of the insolvent.

If he was entitled to a reasonable compensation for his services as a provisional trustee, (and *quere*, if he was so entitled?) he forfeited any claim which he might have so had by refusing to deliver over the estate and effects to the permanent trustee.

For the same reason he is liable for interest on the amount of funds in his hands.

The *United States* could not, in case of a delivery by a provisional trustee of the estate and effects of an insolvent debtor, to the permanent trustee, maintain their right of priority so as to subject the provisional trustee to personal liability by reason of his having so delivered the effects, without first discharging a debt due to the government from the insolvent.

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pellant to the government, (by the assent of the counsel for the appellee,) gave a decree for the entire balance in the hands of the appellant, *including interest thereon*, and *refused to allow to him any commission*, as trustee, a commission of 8 p. cent. (the usual commission allowed to trustees acting under the insolvent laws,) having been charged as an item in the account filed with the answer of the appellant in the court below. From this decree the appellant appealed. The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, STEPHEN, and ARCHER, J.

Taney, for the Appellant, contended, *First*, That inasmuch as the *United States* have a priority to be paid out of an insolvent's estate, of which assignees, and other persons, are required to take notice, the appellant was *bound*, as trustee, to see to the payment of the *United States*, out of the estate in his hands, before he transferred the estate to the *second* or permanent trustee. In support of this position he cited *Colvin's Edit. Acts of Congress, 1797, ch. 368, sec. 7, & 1799, ch. 128, sec. 65. Fisher vs. Blight, 2 Cranch, 359. United States vs. Howland, 4 Wheat. 108, and (note 118.) Thelluson vs. Smith, 2 Wheat. 396.* But stated to the court, that he owed it to candour to acknowledge, that on this point he did not mainly rely.

Secondly. That on the principles of equity, and according to the spirit of the insolvent laws, the appellant is entitled to the usual commission for the time he administered the insolvent estate, (which extended to 15th October,) before the appointment of a permanent trustee, and until December, by the assent of such permanent trustee, at which latter date, a large amount of the estate was duly and faithfully administered, as he contended. He admitted that there was no provision in the insolvent laws, which specified any commission or compensation to the provisional trustee, but contended, nevertheless, that if not entitled to the commission usually allowed to permanent trustees, he was at least entitled before a court of equity to a *pro rato* compensation for the time devoted to the trust under the provisions of the law—that is to say, whilst he lawfully acted as provisional trustee, and whilst he continued to act with the assent of the appellee. He assimilated his case to that of a trustee under the general insolvent laws, who, by removal, death, or the necessity of quitting the

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state, was superseded in the execution of the trust, by the appointment of a successor, in which cases, there could be no reason for refusing the first trustee a *pro rato* compensation, if not the entire commission, on the amount of funds collected by him, during the time that he faithfully acted in the management of the estate. He contended also, that the duties of trustee, which, by the acts of 1805, and its supplements, were imposed upon a single officer, were by the act of 1816 divided among *two* officers, the provisional trustee, (an officer before unknown to the law,) and a permanent one, and that the omission to apportion the commission could only be supplied by a court of equity. As to the item of interest claimed by the appellee, and decreed by the court below, he relied upon the settled law and practice of the courts, not to charge a trustee with interest, except under peculiar circumstances, none of which existed, as he contended, in this case, and especially as the appellant was not charged with any mismanagement of the estate, but had only erred, (supposing he did err,) in a belief that he had a right and indeed *was bound*, under his construction of the acts of congress, and of the decisions thereon, to pay the government of the *United States*, instead of handing over the whole estate to the appellee, and leaving it to him to do so. That this conduct had not injured the interests of the creditors, as the right of priority of payment was an indisputable and undisputed right, established by the decisions of the highest judicial tribunal of this country, to which, upon all such subjects at least, this court, and every other court, state as well as federal, were bound to conform. For these reasons he contended, that the item of a commission, or at least a portion of it, ought to have been allowed by the court below, and that the appellant should not have been charged with interest, and that the decree ought now to be reversed *pro tanto*.

R. B. Magruder, for the Appellee, contended, that the record could present but a single question, all the other points being wrapt up in that. It was this, viz. Could the *United States*, in case of a delivery by the appellant as provisional trustee, of the estate, effects, &c. of the insolvent, to the appellee, the permanent trustee, in obedience to the provisions of the acts of assembly, have so asserted and maintained their right of priority, as to have

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subjected the appellant to personal liability by reason of his having so delivered the effects, without *first* discharging the debt due to the government? If this question should be decided affirmatively, then there could be no doubt that *interest* could not be claimed against the appellant, and a court of equity would do its utmost to allow him compensation, either in the shape of a commission, or in some other mode. He contended, that as *provisional* trustee, technically so called, the appellant was entitled to no compensation, that officer being a creature of the act of 1816, *ch.* 221, and no provision being made thereby for any commission, he being regarded by the law as a mere depositary for a short time, subject to no risk, bound to the performance of no duties, and being as it were, simply a stakeholder for the benefit of creditors, and in practice remaining such but a very few days. In support of this position, he cited *Kennedy vs. Boggs*, 5 *Harr. & Johns.* 408. He contended further, that if it was attempted to assimilate the provisional trustee, to trustees acting under deeds of trust, a court of chancery could not, consistently with established usage, supported by authority, allow him any thing by way of commission, *even if he behaved well*, unless indeed a provision could be shown to have been made in the deed of trust, allowing such compensation; and there could be no more reason why an omission in the act of assembly to provide for such compensation, should be supplied by a court of chancery, than such an omission in a deed of trust, should be supplied by it. In support, and by way of illustration of this position, the counsel cited *Robinson vs. Pett*, 3 *P. Wms.* 250. 2 *Fonbl.* 176, in notes and authorities there cited. But he contended, that even admitting, that under certain peculiar circumstances, a court of equity might, notwithstanding the omission in the law to provide compensation for a provisional trustee, under its general powers as a court of equity, be disposed to supply this omission by granting compensation to him, as would be done to a bailiff or agent of a mortgagee in possession, *exempli gratia*, yet it could only be in a case in which he was perfectly clear from all misbehaviour, or disobedience to the orders of the tribunal under which he acted; and unless such obedience could be shown, a court of chancery would always compel a payment even of *interest*. 2 *Fonbl.* 185, 6. He contended, that in the case at bar, the appel-

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lant had misbehaved, by disobedience to the laws of the state, in his refusal to deliver over the effects, in such a manner as to forfeit any claim he might have had to a commission, under an application to the general equity powers of the court below, and had subjected himself to the superadded penalty of *interest*, by way of damages for such refusal. And although such refusal might have proceeded from a mistaken construction of the acts of congress, and from a belief that he was doing his duty in so refusing, and even under the sanction of the advice of counsel, as it appears by the answer of the appellant it did, yet that was a risk to which he subjected himself by his acceptance of the trust, and the law can make no allowance for such misconception, or mistake. 2 *Fonbl.* 172, book 2d, sec. 2d, (*note c.*) The question, therefore, still was, whether the appellant had misbehaved? And for the purpose of showing that he had, the counsel referred to the statute of bankruptcy 5 *Geo. II. ch.* 30, s. 30, (page 96 of *Cooper's Bankrupt Laws*,) which imposed upon the provisional assignee a fine of £200 for a refusal to surrender the estate of the bankrupt to the permanent assignees; and he cited also the act of congress of the *U. S.* 1800, *ch.* 173, sec. 7, (*Colvin's Ed. vol.* 3,) in which a penalty of \$5000 is imposed upon the provisional assignee in case of neglect or refusal to deliver to a permanent assignee; and in which it is also declared, that the imposition of this penalty is not to affect the right of the creditors to proceed at common law against the provisional assignee for any damage occasioned by such refusal. He referred also to the act of assembly of *Maryland*, 1819, *ch.* 84, sec. 8, for the purpose of showing the opinion of the legislature upon this subject. From the provisions contained in these sections of the various statutes referred to, he argued, that unless it could be shown that the provisional trustee *was bound* to respect the paramount right of priority of payment, alleged by him to exist in the *United States* government, and was prohibited by the existence of that right, and by a certainty of his own personal responsibility, unless he retained funds to discharge it, from paying over to the permanent trustee, he could not claim compensation, and would be chargeable *with interest*, for the funds in his hands, so refused to be delivered over.

The question then is, as was stated in the outset, "could

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the *United States* have compelled the provisional trustee to pay their claim, after he had surrendered to the permanent trustee, without retaining funds to satisfy the *U. S.* of whose claim he had notice?" The counsel for the appellee stated, that he did not mean to dispute the right of priority of payment which the government of the *U. S.* has, as claimed, and indeed established, by judicial decisions of high and revered authority. On the contrary, although he thought the doctrine had been pushed in this republican country quite far enough, to a point far beyond that to which it had been carried under the royal government of *Great Britain*, although it could be shown that the prerogative right of the *King of England* was far less extensive, yet after the decisions which have been made by the tribunal to which the sovereign power of this country have delegated the right to decide, he could not, for a moment, hesitate to yield to them his entire submission. Although there was no express grant of power, by the constitution, to the government of the union, to assume this right, nor any legislative act founded upon such express grant, yet the right is assumed as a necessary means whereby an end or purpose legitimate and constitutional may be accomplished. The constitution of the *U. S.* expressly grants the power to lay and collect imposts and duties, and requires the government to pay the debts of the nation. As congress has the power to exact payment of the duties, instantly upon the arrival of the goods, and the nation has a right to detain them; until such duty is paid, it has a right to superadd to the security given on a bond, the further provision, that in case of the death or insolvency of the importer, his estate shall *first* pay the claim of the government, to the exclusion of every body else. So, when the duty of paying the national debts, of raising and maintaining armies, and equipping fleets, for our protection; of establishing post offices and post roads, for our security, and convenience—of guaranteeing our republican forms of government—when all those duties devolve upon the national councils, it is perhaps no more than proper, as it is for the benefit of all the people of the *United States*, that the government should never be the loser, if a debtor left estate enough to pay their debt; and as every citizen is aware of this right of priority, it is not unjust, because all men con-

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tract, with reference to it, and with a knowledge of its existence. He would not, therefore, with the feelings of reverence and affection which he entertained, in common with all who knew the value and the excellence of the constitution under which we live, withhold from the government of the union any of its just rights, whether the same are clearly and expressly granted, or are the result of necessary implication. On the contrary, both here and elsewhere, he would extend to it every right and privilege to which it was entitled. Indeed he should feel a reluctance, even in a legal discussion, to withhold from the national government the exercise of any right, if in his candid judgment they were entitled to it. The temple of justice was no place to hazard such sentiments. The profession to which he had the happiness to belong, ought not to be prostituted to a purpose so ignoble, more especially in a country like ours, the stability of whose government, the happiness of whose people, (and when he said that, he might add the happiness and hopes of all mankind,) depend upon the maintenance of correct principles upon the subject of the rights of the general and of the state governments respectively. It was upon the maintenance of proper sentiments on this all-important subject, that our most happy and glorious constitution is to be preserved, and with it the rights, the hopes, the liberties of mankind. And counsel could not be justified in advocating upon such a subject, merely for the sake of argument, sentiments and opinions which they condemned in their judgments, however they might be authorized to do so on mere questions of property. That in the courts of justice of the country, the depositories of the sacred rights which our forefathers placed in their holy keeping, sentiments ought not to be hazarded for the mere purpose of making an ingenious argument on questions involving the liberties of ourselves, of our children, involving dear bought rights acquired with so much blood and treasure, and consecrated by so many sighs, and tears, and sufferings.

The counsel have endeavoured to show, that the true construction of the acts of congress, and of the several decisions made upon them was, that the debt due to the government of the *United States* was the "highest in dignity," and entitled to "priority of payment," out of the estate of the insolvent, but recoverable from that estate un-

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der the laws of the state of *Maryland*, and in the mode pointed out, and from the agents, trustees or officers, created by the provisions of those laws. That this construction asserted and maintained in full force the powers of *both* governments, giving to that of the union the supremacy to which it was entitled, according to the will and intention of the people, and reserving to that of the *State* all its just rights. That any other construction would lead to the establishment of a doctrine little less monstrous than this, viz. that congress might, under pretence of the government being a creditor, alter the laws of the states to direct descents, or the testamentary laws, &c. &c. subjects, with the regulation of which, it never was intended, or even dreamt, that the national government should in any wise interfere. He cited *Dallas's* remarks in *Fisher vs. Blight*, 2 *Cranch*, 381, and the act of congress 1789, *ch.* 20, sec. 34, vol. 3d, page 70. He then endeavoured to show, by several illustrations, the powers of the general and state governments respectively on particular subjects, and the complete independence and sovereignty which *each* had a right to exercise on given subjects, legislation upon which was prohibited to the other, from the nature and reason of the thing itself; and concluded, by endeavouring to show, that a construction contrary to that for which he contended, would amputate an important limb of state sovereignty, and thereby strike at the existence of that grand and delicate organization so complicated in its detail, yet so simple in its principle—that curious and beautiful economy of government, which could only be preserved by upholding that nicely adjusted balance which the authors of the constitution so skilfully and solicitously fashioned.

THE COURT. Without determining the question how far this court, as a court of equity, or the court in which the decree was passed, had power to allow to a *provisional* trustee a proper compensation for his services, in a case in which he should appear to be clearly entitled to compensation, upon which point the court do not intend to give any opinion, we think, that even supposing that the appellant might have been entitled to a reasonable compensation for his services, before his refusal to deliver over the estate and effects of the insolvent, he forfeited any claim which he might have so had, by reason of his having so refused to

deliver, as the court have no doubt he was bound to do, upon the demand made on him by the appellee as permanent trustee. For the same reason he is liable for interest.

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DECREE AFFIRMED.

WATKINS vs. STOCKETT's Adm'r. *D. B. N. et al.*

JUNE.

APPEAL from the court of chancery. The bill of complaint in this case was filed by *L. Stockett*, the executrix and devisee of *John Stockett*, and on her death a bill of revivor was filed in the names of the administrator *de bonis non* of *John Stockett*, and of the executor and devisee of *L. Stockett*, (now appellees.) The original bill was for the purpose of redeeming a tract of land, and some slaves, which were conveyed by *John Stockett* to the defendant, (now appellant,) by deed dated the 28th of June 1816. The deed purports, on its face, to be an absolute conveyance, but is alleged by the bill to have been intended as a mortgage, and to have been executed to secure the repayment of a sum of money which the defendant lent to *Stockett* about the time the deed was executed.

A full statement of the case is given in the opinions delivered by the chancellor, and by this court.

KILTY, Chancellor, (December term 1820.) This case was fully argued at an early period of the present term, and has remained on a suggestion made by the court, as to the parties, which has been acted on by the counsel on each side. The object of the bill is to compel the defendant to reconvey the property mentioned in the deed exhibited, on the repayment of the sum intended to be secured. The deed is in form an absolute conveyance, but is alleged to have been intended as a mortgage. The defendant, in his answer, states the execution of the deed, and charges, that on the day he advanced and lent to *J. Stockett* the sum mentioned as the consideration, but that there were other sums due. I consider this part of the answer conclusive as to the deed being in the nature of a mortgage, and the property redeemable, notwithstanding the allegation in another part of the answer that the deed was declared by *J. Stockett* to be an absolute conveyance; and it will be observed, there is an admission that it was understood between

Fraud may be inferred from facts and circumstances, from the character of the contract, or from the condition and circumstances of the parties.

Parol evidence is inadmissible to vary or contradict the clear import of a written instrument, as well in equity as at law, except where fraud is charged, or in cases of trusts.

Unless fraud in obtaining a contract is charged in the complainant's bill, parol evidence of it cannot be received.

Where the defendants answer to a bill alleging a contract to have been entered into by mistake, denies the mistake, the strongest proof is necessary to destroy the effect of the denial.

S. executes in favour of *W.* an absolute deed, on its face, of his real and personal estate, for a certain monied consideration stated by the deed to have been paid by *W.* and then dies. In a bill filed by *S.*'s representatives, stating that the deed was intended as a mortgage only, and praying to redeem, and *W.* in his answer, denying that the deed was intended as a mortgage, and insisting that it was designed to be an absolute conveyance—*Held*, under all the circumstances, that the complainants were not entitled to relief.

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the parties that the property was to be used and enjoyed by *J. Stockett* during his life.

It appeared to be admitted also in the argument, that there was not a purchase or sale in the ordinary way, nor a full consideration expressed, and that therefore debts were afterwards paid by *N. Watkins*.

The evidence taken on the commission is contradictory, but need not be recapitulated, as it would be extraordinary if any could be produced sufficient to counteract the effect of the answer. The complainant is therefore entitled to relief upon the terms which he offers, to wit, the payment of the sum intended to be secured, with interest; and to ascertain what that sum is, an account will be necessary. *Decreed*, that the parties account with each other touching the matters referred to in the premises, and that the auditor state an account between them in the usual manner, and return the same to this court for further order or decree.

The auditor reported sundry accounts stated by him, numbered A, B, and C. The complainants excepted to accounts A and C, and insisted that account B was the correct one. The defendant excepted to all of the accounts.

JOHNSON, Chancellor, (July Term 1822.) On the 28th June 1816, *John Stockett*, in consideration of \$810 paid, conveyed to *Nicholas Watkins* two pieces of land, and six slaves. The conveyance, on the face of the deed, was absolute. *John Stockett* remained in the possession of all the property until his death. The present bill was filed by his widow, the devisee and executrix, to redeem the land on the payment of the sum of money found due to the defendant, on the foundation that the deed was executed, not on a sale of the land, but to secure the payment of a sum of money due to the defendant. On the hearing of the cause, my predecessor was of the opinion the deed must be considered only as a mortgage, and on the 28th of February 1821, passed an interlocutory decree for an account; in pursuance thereof, on the 21st of September following, a report was made by the auditor, which contains three statements; the first account A, prepared in compliance with the instructions of the defendant, makes the sum due to him to be \$4430 13; account B, prepared in pursuance of the complainant's directions, makes the

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sum due to the defendants \$1064 21; and by account C, made out by the auditor, in conformity with the view taken by him of the cause, the sum due amounts to \$2633 94. As then the deed in question can only be considered a mortgage, several questions naturally arise: *First.* Supposing the deed on its face had purported to secure the sum of \$810 as then due from the mortgagor, could any proof be received to increase that debt, by claims taking their origin anterior to its execution? *Second.* If such evidence, under any circumstances, is admissible, is there in this cause any proof that can enlarge the debt? And, *Third.* Will the circumstance of the deed being absolute, when it should only have been a mortgage, vary the case so as to admit of proof that would have been rejected, if the true nature of the transaction had been disclosed on the face of the deed?

When men of sufficient understanding come to a settlement of their various transactions, and enter into solemn instruments of writing purporting to settle the amount due from the one to the other, such adjustments should not be shaken except on the most irrefragable proof, that adhering to the settlement would be productive of clear and evident injustice. It is not the retaining, in the possession of one of the parties, papers and documents that ought to have been delivered to the other, that will be sufficient to defeat the settlement; the party complaining, before he can affect the adjustment that has taken place, must surcharge and falsify, that is, he must establish that just and sustainable claims on his part had not been brought into the settlement, and, as I conclude, give some valid reason why they were not so brought in; or must, by evidence clear and incontrovertible, prove that some of the items admitted were false. These principles must be adhered to, or settlements, which ought to be of vast importance, must pass away as of little importance in dealings between man and man. If then the deed in question had purported to secure the payment of the sum stated as its consideration, before any evidence could have been received to establish a larger or a smaller sum to be due, the sum must stand, until defeated in the manner before mentioned. The converse course of putting the parties to ascertain the items by which the aggregate was made up, could not be resorted to, as such a rule would of necessity give no effect whatever to the settlement that had been made.

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It may then be asked, is there any evidence by which, it appears how the sum of \$810, the consideration for the deed, was made out? The auditor, in his account, conjectures certain items as being component parts of that sum; but even with them he is driven again to conjecture how the difference between the items he mentions, and the sum stated for the consideration, was made out; but by such a process of reasoning the settlement itself is not to be shaken, and of course it must follow that the sum explicitly stated to be due, if the deed had been so drawn, would have stood and remained immoveable. Is there then in this cause, admitting that under some circumstances evidence is properly admissible to enlarge the claim, such as can enlarge it? The question has nearly, if not entirely, been determined by what has preceded, and yet on its consideration it may be proper to take a more minute notice of the evidence itself.

Except with what is disclosed in regard to the proof on exhibit D, which relates to a transaction as early as the 21st of April 1808, no dealings appear between *John Stockett*, deceased, and the defendant, and the claim set up on that account, by the exceptions on the part of the defendant, was at the argument abandoned. The first dealings then, having a relation to the cause commenced on the 10th of February 1812, when the exhibit B of that date was executed, and by which *John Stockett* is made to transfer his claim on *John Rawlings*, for 250 acres of land, sold by the former to the latter at £5 pr. acre, the whole amounting in dollars to 3333 33 $\frac{1}{3}$ cents, in consideration of \$500 alleged to be paid to him by *N. Watkins*, and this transfer, as well as the deed before mentioned, is absolute; and yet, exclusive of other proof, there is on the face of the instrument itself sufficient to create very reasonable doubts whether it was not executed merely to enable *N. Watkins* to collect the claim for *John Stockett*. There is nothing in the cause to prove that *John Rawlings* had paid any part of the debt before assignment.

John Stockett, (to use the language of *Thomas H. Bowie*, a witness on the part of the defendant,) "was a very weak man, and very intemperate, incoherent and wild, in his conversation," more than four years after he had employed (because not adequate of himself,) *N. Watkins*, the defendant, who is the reverse of a weak man, comes to a

settlement with him, and executes a deed, that has been determined was to secure the sum due; what sum? certainly the whole amount; and therefore, if any thing more was then due, it would have been included in the consideration.

On an examination of all the items demanded by *N. Watkins*, even including the exhibit D, it will be found they will not amount to the assigned claim on *Rawlings*, supposing the whole to have been due when assigned, and no evidence of a payment appears.

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On the 19th of February 1810, *Stockett* gave his note to *N. Watkins* for \$500, only nine days after the assignment, and for the same sum as is expressed for the consideration of the debt itself. On the 20th of March 1812, the notes from *Stockett* to *Nicholas Watkins*, for £74 11 6, which afterwards came into the hands of *John Duvall*, the administrator of *Rawlings*, the debtor of *Stockett*, was taken up by him, and accounted for in his settlement with *N. Watkins*, the attorney in fact of *Stockett*, the real creditor of *Rawlings*, by discounting, no doubt, the one from the other. The note for the \$500, as well as the claim on account of the debt due from *Stockett* to *Nicholson*, were no doubt embraced in the settlement made between *Stockett* and *N. Watkins* on the 22d of February 1814, when the latter obtained from the former a receipt in "full amount of my claims against *John Rawling's* estate for the land sold to said *Rawlings*." See the defendant's exhibit D. When the \$40 were paid to *Thomas H. Bowie*, and the \$63 10 to *B. Welsh*, does not appear; and before they can be added to the mortgage debt they must have been made after the deed was executed, or they must come in under evidence surcharging and falsifying. On the whole of the case, if the manner the deed was drawn and executed does not vary the cause from the predicament it would have stood in, supposing the deed to have purported to have been a mortgage, then the sum stated to be secured, and no other, could have been demanded. In respect to the third question, I shall only remark, that the concealment of the real nature of a transaction can never give to the party concealing an advantage, that a full disclosure of the truth of the case would have deprived him of; and therefore, in this case, as in the event of the deed having disclosed itself to have been a mortgage, there is no evidence that

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could justify a departure from the sum mentioned; so will not the deed, as it stands, vary the cause. The exceptions taken on the part of the complainants, are ruled good, and those by the defendant overruled. But in order to raise the money due to the defendant, and as stated in account B—*Decreed*, that unless the complainants bring into court, to be paid to the defendant, \$1064 21, with interest on \$810, a part thereof, from the 21st of September 1821, on or before, &c. the land and property in the deed from *John Stockett* to the defendant, dated the 28th of June 1816, or so much thereof as shall be sufficient, shall be sold, &c. From these decrees the defendant appealed to to this court.

The cause was argued at June term last, before BUCHANAN, Ch. J. EARLE, MARTIN, and ARCHER, J.

T. B. Dorsey, (Attorney General,) and *Ridout*, for the Appellant, contended, 1. That the deed, purporting on its face to be an absolute conveyance, and the bill containing no allegation of fraud, mistake or surprise, in obtaining its execution, parol evidence was inadmissible to vary its terms, and prove it to have been a mortgage.

2. If parol evidence could have been received, the testimony in the cause does not show the deed to have been intended as a mortgage, but on the contrary, most distinctly proves, that it was designed to be an absolute conveyance.

3. The answer contains no admission that the deed was intended as a mortgage, nor any thing which could justify the court in inferring such an admission, in opposition to the positive averment of the answer to the contrary, and in opposition to the testimony in the cause.

4. Supposing the deed to have been intended as a mortgage, and the appellees entitled to redeem, still they cannot do so without paying a much larger sum than they are directed to pay by the chancellor's decree.

On the *first point*, they relied on *Wesley et al. vs. Thomas*, (*ante* 24.)

On the *fourth point*, to *Powell on Mort.* 399, 400, 405, 406.

Magruder and *Boyle*, for the Appellees, referred to *Taylor vs. Haylin*, 2 Bro. Chan. Ca. 310. *Johnson vs. Curtis*, 3 Bro. Chan. Ca. 266. *Stapilton vs. Stapilton*, 1 Atk. 1.

2 *Fonbl.* 263, (note h,) and *England vs. Codrington*,
1 *Eden*, 169.

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Cur. adv. vult.

ARCHER, J. at this term, delivered the opinion of the court. In this case the appellees filed a bill in the court of chancery, stating that *John Stockett*, on the 28th day of June 1816, executed an absolute deed, purporting to convey to *Nicholas Watkins* of *Thomas*, sundry parcels of land, and several negroes, and charges, that it was the intention of the parties that it should be only a mortgage, and that it was designed to secure the payment of a sum of money loaned by *Watkins* about that time to *Stockett*. That *Stockett*, notwithstanding the conveyance, remained in possession until the time of his death, and that the consideration was greatly less than it was really worth. The bill prays a reconveyance of the property to the complainant, who is the devisee and executrix of *John Stockett*, upon the repayment, with interest, of the sum actually intended to be secured by said deed; and the respondent is particularly interrogated and required to answer what sum of money was loaned by him to *John Stockett*, at what times, and for what purpose.

The answer of *Watkins* states, that on the day of the execution of the deed, he advanced and lent to *Stockett* the consideration expressed in the deed; that *Stockett* was in debt to him in other and large sums of money, for services rendered, and for monies advanced and paid, and also for the sum of \$500, lent to him on the 19th of February 1810, for which he held the respondent's note; and expressly states, that the deed, at the time of its execution, was considered and declared to be by *Stockett* an absolute conveyance, and was executed, not only in consideration of the sum therein expressed, but in consideration of the services rendered, and the sums advanced, as above stated; and that it was understood between *Stockett*, and himself, that the land and negroes conveyed were to be possessed, used and enjoyed, by *Stockett*, during his life, and that at his death they were to vest in the respondent in full property and possession.

By the evidence in the cause, it appears that *Stockett* and *Watkins* both applied to a conveyancer to draw a deed for the land; that instructions were given by one or both, both

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being present, to draw an absolute deed; that *Stockett*, previous to the execution of the deed, had declared to several persons his determination that his relatives should enjoy no benefit from his property, having been illy treated by them; and that he meant to convey it to one of *Watkins's* children; that he was a weak man, and intemperate; that upon several occasions, when claims were presented to him for payment, he declared he had no property, that what he was in possession of, belonged to *Watkins*. That *Watkins*, at different times after the execution of the deed, declared to several persons, among others to Mrs. *Stockett*, after the death of her husband, that he had an absolute conveyance for the land and slaves, and that he spoke of claims which he had against the estate of *Stockett* after his death. The property conveyed is proved to have been worth about \$2700. The claims which *Watkins* had against *Stockett* are variously represented. He stated an account against him which, even excluding the consideration money mentioned in the deed, amounted to upwards of \$2700.

By the auditor's report, claims were allowed to *Watkins*, which, with interest on them from their date to the day of the execution of the deed, would amount to about the sum of \$1700. Some of *Watkins's* claim, consisting of items of a considerable amount, were disallowed by the auditor as of a doubtful character, the proof adduced in their support being deemed by that officer insufficient. The chancellor considered the deed to be a mortgage, and having ascertained the amount of *Watkins's* claim against *Stockett*, decreed the land, conveyed by the deed, to be sold for the payment of the claim. From this decree the present appeal has been taken.

It is an admitted principle that fraud may be inferred from facts and circumstances, from the character of the contract, or from the condition and circumstances of the parties. *Chesterfield vs. Jansen*, 1 *Ves.* 155. *Newl. on Cont.* 352.

The evidence upon which the fraud in this case is attempted to be founded, arises from the inadequacy of the price, the state of mind of the grantor in the deed, and from the circumstance of the grantor's remaining in possession of the property after the execution of the deed, until his death. Mere inadequacy of price, unaccompanied with any circumstances, indicating that the grantor

did not understand his bargain, or was so oppressed that he was glad to make it, knowing its inadequacy, may be a sufficient intention of fraud. *Heathcoat vs. Pagnon*, 2 Bro. Cha. Ca. 175. The ignorance of the grantor can be inferred neither from the inadequacy of the consideration, nor from any evidence in the cause, but on the contrary is expressly contradicted. The conveyancer was especially instructed, either by him or in his presence, to pass an absolute estate. No room is left for the inference of circumvention or fraud. He transferred his estate with his eyes acknowledgedly open to the nature and quality of the estate, which was transferred, and was intended to be transferred. He does not, it is true, appear to be a man possessing dexterity in the management of his affairs, on the contrary is said, in the language of one of the witnesses in the cause, to have been a weak man; but the nature and character of that mental imbecility is unknown to the court. It no where appears that he was incapable of transacting the ordinary affairs of life, or was peculiarly liable to imposition from the artful and designing, nor does it appear that any efforts were made to take advantage of this alleged imbecility. In the case of *Clarkson vs. Hanway*, 2 P. Wms. 213, a deed was set aside, where the inadequacy of price was of so glaring a character that it would be impossible to state it to a man of common sense, without an exclamation at its inequality, and when proof was exhibited that the grantor was of weak mind, of great age, and easily imposed upon; but in this determination much stress was laid upon the absence of all evidence to show, that the grantor had ever given any instructions to the conveyancer to prepare the deed, and that they had in fact been given by the grantee; which circumstances were pointed at as strongly evincive of fraud. In *Griffin vs. Deveuille*, 3 P. Wms. 103, (note) the Lord Chancellor remarks, that in almost every case upon this subject, a principal ingredient is a degree of weakness little short of legal incapacity. The party must be more liable to imposition than the generality of mankind. It was observed by a distinguished jurist, Sir Joseph Jekyll, that where a weak man gives a bond, if there be no fraud nor breach of trust in its obtention, equity will not set aside the bond, for the weakness of the obligor alone, if he be *compos men-*

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vis. Nor will a court of equity measure the size of men's understanding and capacity, there being no such thing as an equitable incapacity where there is a legal capacity. This is undoubtedly the safest doctrine, where there is a total absence of all fraud and imposition.

Neither fraud nor an original intention to execute a mortgage, could be inferred from the grantor's remaining in possession. As against creditors, that circumstance might furnish, in connexion with other testimony, evidence of an original fraudulent intent. But it is difficult to conceive how the grantor's remaining in possession, with the toleration and by the permission of the grantee, and from mere forbearance towards him, will enable his devisee, or legal representatives, to set up fraud from this circumstance. Fraud cannot be intended or presumed, (per Lord Ch. J. Treby, in *Bath vs. Montague*, 3 Cha. Ca. 106.) To set aside the deed, or give it a different efficacy from that which it naturally and legally imports, so far as the grantee, or his legal representatives, are concerned, would, against the defendant's answer, require not only the allegation, but the most unequivocal evidences of fraud on the part of the grantee.

Where fraud exists equity will interpose, and make the contract conformable to the intention of the parties. It has been decided, that where a plaintiff filed a bill to redeem an annuity, and it became a question whether parol evidence could be admitted to show the intention of the parties that the annuity should be redeemable, but no clause to that effect had been inserted in the deed, that if the clause had been omitted, or varied by fraud, the evidence would be admissible. 1 Bro. Ch. Ca. 91. Parol evidence is inadmissible to vary or contradict the clear, certain, and unequivocal import of a written instrument; and the rule of evidence is the same at law as in equity, except where fraud is charged, or in cases of trusts where, in order to get at the real intention of a trust, or use declared under deeds for the sake of justice and equity, an inquiry will be permitted into the real merits of the case. 2 Atkyns, 229. It would indeed lead to infinite mischief if writings, which show clearly the agreement of parties, were permitted to be contradicted, and new stipulations interpolated. There would be no security in property, and no faith

reposed in the most solemn conventions. Indeed where fraud is charged, and the evidence establishes it, it has been remarked, that the statute of frauds may very properly be put out of the way, since the object of such evidence is not properly to contradict the instrument, but to raise an equity *de hors* the instrument, in contradiction of an intent which no law or statute will be suffered to assist or protect; and so, where mistakes are proved to exist, a court of equity will reform the contract. The cases under this head are digested in *Sugden*, and the power of the court to interfere seems to be indisputable.

The decree of the court of chancery seems to be bot-tomed on the answer of the defendant, as containing an admission of the original intent of the parties that the in-strument should have been a mortgage. It is inconceivable upon what ground this deduction could have been made. The respondent is specially interrogated by the bill as to the amount of the monies loaned. The answer states the amount loaned, at the time of the execution of the deed, as previous thereto, and it explicitly declares, that these sums, and other debts at the time existing, constituted, unitedly, the consideration, and that an absolute deed was expressly agreed to be made.

It must be remarked, that fraud is not alleged as a ground for the interposition of a court of equity in this case; and without this allegation, proof of fraud would be inadmissible, according to the determination of this court in the case of *Westly vs. Thomas*. And if we infer the allegation of a mistake from the general charge of the bill, the evidence conclusively shows the original design to have been to execute an absolute conveyance. The answer denies the existence of a mistake, and in such cases there should be the strongest possible proof. Lord *Thurlow*, in *Irnham vs. Child*, 1 Bro. Ch. Ca. 92, said, that the proof of a mistake should be established as much to the satisfac-tion of the court as if it were admitted, and *that the dif-ficulty of doing this is so great, that there is no instance of its prevailing against a party insisting there is no mis-take*.

DECREE REVERSED.

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YERBY *vs.* LACKLAND, *et al.* Garn. BEEDING.

APPEAL from *Montgomery* county court. The now appellant, as plaintiff in the court below, in order to obtain an attachment under the act of 1795, *ch.* 56, produced to the clerk of that court an affidavit, with a promissory note thereto annexed, together with a warrant from a justice of the peace of that county, directing the attachment to be issued. The affidavit is as follows: "State of *Maryland*, *Montgomery* county, to wit: On this fourth day of February 1819, personally appeared before me, the subscriber, a justice of the peace for the county aforesaid, *John Yerby*, a citizen of the *United States of America*, and made oath on the Holy Evangelists of Almighty God, that *Craven P. Beeding* is justly and *bona fide* indebted to him in the full and just sum of three thousand seven hundred and fifty-eight dollars current money, over and above all discounts. And the said *John Yerby* further made oath at the same time, that the said *Craven P. Beeding*, to his certain knowledge, is not a citizen of the state of *Maryland*, and doth not reside therein. *Jesse Leach.*"

Under the act of 1795, *ch.* 56, no attachment can issue except the attaching creditor appears by the proceedings to be a citizen of this state, or of some other of the *U. States*.

It is not sufficient that he appears to be a citizen of the *U. States*.

One may be a citizen of the district of Columbia, or of either of the other territories of the *U. States*, and not be a citizen of any one of the states, within the meaning of the said act of 1795, *ch.* 56; and no citizen of the said district, or of the territories, can issue an attachment under that act.

An attachment was issued in the usual form on the 4th of February 1819, and was laid upon sundry parcels of land claimed by *Beeding* in right of his wife, and also laid in the hands of the executors of *James Lackland*, and of *James C. Lackland*, as garnishees, on the 18th of February 1819, who appeared and pleaded *Nulla Bona*. To this plea there was a general replication, and certain interrogatories were exhibited to the garnishees, which they answered.

At the trial it was agreed, that *James Lackland*, deceased, died in the year 1814, having by his will, dated the 9th of October 1813, devised, among other things, as follows: "I will and devise, that all my estate, both real and personal, remain under the care and control of my executors hereinafter named, until all my children arrive at full age; and after they all arrive at age, and two thirds of them demanding a division, I will and devise, that all my estate, real and personal, shall be equally divided between all my children or their heirs, and that those of my children to whom I have made advancements shall bring such advancements into hotchpot, as a part of my estate, before such division takes place. I further will and devise, that if my executors hereinafter named, shall be of opini-

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on that they can make any advancements to my son *Dennis Lackland*, out of the profits arising from my estate, after supporting my children that are single, that they may in their discretion, advance him any sum as a part of his portion of my estate, so as not to exceed his full portion of my estate; and provided any of my children should marry before a division of my estate takes place, I hereby authorise and empower my executors to make such advancements to either of my children so marrying, so as not to exceed their portion of my estate, as they in their discretion may think proper." *James Lackland* left, at the time of his death, eight children, his devisees, to take his estate real and personal, according to the terms and conditions of his said will, and the youngest child arrived at the age of 21 years in May 1820. *Rosetta Beeding*, then *Rosetta Lackland*, was one of the children and devisees of *James Lackland*, and the property mentioned in the schedule of the sheriff in this case was a part of the estate of *James Lackland* at the time of his death. In the spring of the year 1816, *Craven P. Beeding* intermarried with *Rosetta Lackland*, one of the daughters and devisees as aforesaid of *James Lackland*, and at the time of their intermarriage, and at the several times hereinafter mentioned, the estate, real and personal, of *James Lackland*, was held by the devisees in common, and undivided, under the care of the executors named in the will, according to the terms and provisions of the same. After this marriage *Craven P. Beeding* received from the estate of *James Lackland*, at various periods and dates, personal property to the value of \$1129 10. In February 1818, the real estate of *James Lackland*, being then held in common under the will aforesaid, and the devisees of the age of twenty-one finding it impossible to have a sale or division of the real estate, without legislative interference, they the said children and devisees, with the aid and consent of the guardians of those under age, procured the passage of an act of assembly of this state, 1817, ch. 215, entitled, "An act to appoint trustees for the sale of the real estate of *James Lackland*, late of *Montgomery* county, deceased." By this act, *William Darne* and *Dennis Lackland* were appointed trustees to make sale of all the real estate of *James Lackland*, upon certain terms and conditions, first giving bond, with security to be approved by the orphans court of the county. The money

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arising from the sale of the said lands, after the payment of expenses and the debts due by the estate of *James Lackland*, was directed to be paid over to his devisees, or to his, her or their guardian or guardians, representative or representatives, in equal proportions. The trustees entered into bond, agreeably to the directions of this act of assembly, on the 15th of August 1818, but had not sold any part of the land therein mentioned at the time the attachment in this case was laid on the property in question. After the passage of the act of assembly, but before any sale was made under it, *C. P. Beeding*, and *Rosetta* his wife, executed and delivered, on the 21st day of February 1818, and which was duly acknowledged and recorded, an indenture, conveying and transferring to *James C. Lackland* all their right and title to one eighth part of the real estate of *James Lackland*, deceased, "to have and to hold the said estate and interest so as aforesaid described, and hereby bargained and sold, or meant, mentioned, or intended hereby so to be, and every part and parcel thereof, to the said *James C. Lackland*, his heirs and assigns, for ever, in trust for the intent and purpose, that he hold the same, and receive the rents, issues and profits, for the separate and exclusive use and benefit of the said *Rosetta L. Beeding* herein named; and that if the said estate shall be sold under an authority from the *Maryland* legislature, or by any other legal authority, that then he the said *James C. Lackland*, shall have and receive the proceeds of the sale, so far as they the said *Craven P. Beeding* and *Rosetta L. Beeding*, or either of them, would be entitled if the sale had been so authorised and made before the execution of this instrument of writing; and the said proceeds, so received, he the said *James C. Lackland*, and his heirs, shall hold and employ for the sole separate and exclusive use, and benefit of the said *Rosetta L. Beeding*, and her heirs and assigns, for ever." On the 19th of September 1818, *Craven P. Beeding*, duly executed, acknowledged, delivered and recorded, an indenture, conveying and transferring to *James C. Lackland* all his personal property, and directing the same to be sold, and out of the proceeds to pay certain of his creditors, and the residue, if any, to be divided amongst all his other creditors, &c. On the 15th of October 1818, *Craven P. Beeding* drew certain drafts on *William Darne* and *Dennis Lackland*, as trustees under

the act of assembly aforesaid, one in favour of *A. Taney*, admitted to be for a valuable consideration, and the other in favour of *James C. Lackland*, which were by them accepted, with the following proviso: "provided however, that it shall not be payable by us until a sale of the estate of *James Lackland*, deceased, and not then unless allowed by the court, which shall hereafter govern us in the payment of the money falling due for *Rosetta L. Beeding's* part. And provided also, that if the conveyance to *James C. Lackland* should be sustained as valid for the whole interest conveyed, or the draft in said *Lackland's* favour, this day by us accepted, be sustained in the whole, then this acceptance shall be void." In the summer or fall of 1819, *C. P. Beeding* became an insolvent debtor in the county of *Washington*, in the District of *Columbia*, where he then lived, and had lived for more than three years before, and obtained from one of the judges of the circuit court for the county aforesaid, a discharge according to law, under the acts of congress provided for the relief of insolvent debtors. It was also agreed, that the promissory notes filed with the affidavit made by the plaintiff, were drawn by *C. P. Beeding*, and delivered to the plaintiff, and that *C. P. Beeding* was not a citizen of the state of *Maryland* when the affidavit in this cause was made by the plaintiff, and the attachment was issued and laid. Also that the plaintiff resides, and always has resided in *George-Town*, in the District of *Columbia*; and that after the said notes were drawn and delivered, they were (as it had been intended they should be,) endorsed by the plaintiff and *James Melvin*, and son, and discounted, for the accommodation of *Beeding*, at the Bank of *Columbia*, in renewal of certain other notes of the same amount, and similarly drawn and endorsed, and discounted before them, and which had been continued in said bank, as an accommodation to *Beeding*, for a year previous to the date of those now filed; and that when the said last notes fell due, they were not paid by *Beeding*; but taken up and paid by the plaintiff, *Beeding* having then failed or stopped payment, and having been considerably indebted for some time before and at the time of his conveyances and drafts herein before mentioned. It was further agreed, that the affidavits of the several defendants, relative to the real and personal estate of *James Lackland*, and the proceeds and profits thereof, and *Beed-*

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ing's interest therein, should be considered a part of this statement. On these facts the plaintiff prayed the court to instruct the jury, that the deed from *Craven P. Beeding*; and *Rosetta* his wife, to *James C. Lackland*, dated the 21st of February 1818, and the draft in favour of *James C. Lackland*, were fraudulent and void as against the plaintiff; that *Beeding*, by his intermarriage with his said wife, became seized of an interest in the lands of which her father died seized as aforesaid, and upon that interest the plaintiff had a right to lay an attachment, and having laid it thereon, was entitled to a condemnation thereof in satisfaction of the amount of his claim; as also for the sums stated to be and to have been in the hands of the defendants, as garnishees, for the rents and profits thereof, at the time of laying the attachment, and since. The court, [*Ridgely* and *Kilgour*, A. J.] gave the following opinion: The plaintiff hath prayed the court to direct the jury, upon the aforesaid statement of facts, that the deed from *Beeding*, and wife, to *James C. Lackland*, dated on the 21st of February 1818, and also the order in favour of *James C. Lackland*, bearing date on the 15th of October 1818, drawn on *Darne* and *D. Lackland*, are fraudulent and void as against the plaintiff. That *Beeding*, by his intermarriage with his wife, became seized of an interest in the lands of which her father died seized, and upon that interest the plaintiff had a right to lay an attachment, and is entitled to condemnation thereof, in satisfaction of his claims; also condemnation for the amount of all sums of money stated to be and to have been in the hands of the defendants, as garnishees, arising from the rents and profits of said testator's real estate at the time of laying said attachment and since. Upon this application to the court three questions arise for their consideration and direction—*First*. Whether the deed from *Beeding* and wife to *James C. Lackland*, dated on the 21st of February 1818; and the order drawn by *Beeding* on *Darne* and *D. Lackland*, dated the 15th of October 1818, and conditionally accepted by them on the 19th of the same month, are fraudulent and void against the plaintiff? The court are of opinion, that fraud is a fact that may as properly be inquired into in a court of law as in a court of equity. That by the intermarriage of *Beeding* and wife, (there being no previous marriage contract between them,)

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he the husband, in virtue of his marital rights, acquired an interest in the wife's proportion of her father's real estate, subject to the terms prescribed in the father's will. That it being admitted by the parties that *Beeding* was indebted to the plaintiff, (at the time of the execution of the said deed and at the time the said order was drawn,) to the amount for which this suit is brought, and the said deed appearing on the face of it to be a voluntary deed without valuable consideration, it is therefore declared by the court to be void against the plaintiff, an antecedent creditor, and of no legal effect to defeat the plaintiff's claim in the present suit; and that the order drawn on *Darne* and *D. Lackland* by *Beeding*, in favour of *James C. Lackland*, as trustee for the separate use of his wife, (being founded on the supposed right of the husband to make such a disposition, although previously involved in debt,) and being in pursuance of and in conformity of the deed of trust aforesaid, is also deemed by this court to be null and void, so far as the plaintiff may be affected as a creditor.

With respect to the *second* question, whether the plaintiff had a right to lay his attachment on the undivided interest in the real estate acquired by *Beeding's* wife under the will of her father, and have condemnation thereof in this suit? will depend on the present condition of the real estate. By the act of assembly of 1817, referred to, the real estate of the testator, *James Lackland*, was placed under the power and control of trustees, who accepted the trust, gave bond and security for their faithful performance, and who have proceeded to execute the same long before the present attachment was laid upon the lands. It is therefore the opinion of the court, that the trustees have acquired such a disposing power and interest in the lands, that the present attachment cannot affect or bind the same, even if it had been laid in their hands, and they had been made parties to the suit. That the plaintiff has no remedy in the present suit against the said real estate, but his relief is in a court of equity, where trusts are alone cognizable.

In relation to the *third* question respecting the rents and profits, &c. received by the defendants, the court are of opinion, that whatever sum or sums of money which were in the hands of the defendants as executors, and received as the wife's proportion of the rents and profits, or in the

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hands of the defendant *James C. Lackland*, as trustee, are liable to be affected by the present attachment, and condemnation may be rightfully had thereon, not only the monies in their hands at the time of laying the attachment, but all monies respectively received by them since that period to the present time. After this opinion was given, it was further admitted, that the defendants, *James C.* and *George L. Lackland*, had in their hands, at the time the attachment was laid, the sum of ———, which had been received on account of the rents and profits of the lands of the testator, and retained as *Rosetta Beeding's* share of the same; and that since then they have received the further sum of ———, and retained the same, (or paid it over to *Mr. Beeding*.) on the same account. It was also admitted, that of the lands of the testator, one tract called ———, was sold by *Darne* and *D. Lackland* in May 1820. for \$2000, and that out of that sum \$600, with the interest on that part of the purchase money from the time of the sale, was retained on account of a debt due from the testator, which debt had been either actually paid, or the funds as aforesaid retained for that purpose, and that there was no other debt known or believed to be outstanding against the estate; and that *Mrs. Beeding's* share or interest in the balance of the purchase money was in the hands of *Darne* and *D. Lackland*, the trustees appointed by the act of assembly, and had not been paid over to *Beeding* or *Mrs. Beeding*, or to *James C. Lackland*, but remained in their hands to be paid over to *James C. Lackland*, as her trustee, on the determination of this suit, in case the deed to him from *Beeding* and wife, or the draft and acceptance of the trustees aforesaid, should be sustained as valid against the plaintiff. It was further agreed, that of the lands of the testator some were occupied by the defendants, *George L. Lackland*, and some by *James C. Lackland*, under an agreement with the other heirs to pay rent of ———, annually, and that some of said lands were rented out by defendants to others, and that some were in wood and untenanted. That the said lands lie in this county, &c. and that the yearly value of them is ———, and the gross value of those still remaining unsold is \$12,800. Upon this statement, and the affidavits of the defendants, the plaintiff prayed the court to instruct the jury, that the defendants had no right to sett-off against

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the plaintiff's claim for the rents coming into the defendants' hands after the laying of the attachment, their demand for the \$300 stated in their affidavit to have been over paid *Beeding* on account of the personal estate. But the court refused to give the said instruction as prayed, but instructed the jury, that the defendants might retain and apply the said rents, as they came into their hands, to the credit of their said claim, on said *Beeding*. To this refusal and opinion, as also to the opinion before delivered by the court, the plaintiff excepted; and the verdict and judgment being for the defendants, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

F. S. Key, for the Appellant, contended, 1. That *Beeding's* interest in the land, notwithstanding the act of assembly, was such as to be liable to attachment. 2. That the executors had no right to retain out of his wife's proportion of the rents and profits, for what they had advanced *Beeding*, beyond her fair proportion of the personal estate, even if there was evidence (which there was not,) of their having made such advance.

Magruder, for the Appellees, relied on *Shivers vs. Wilson*, 5 Harr. & Johns. 130, as conclusive against the plaintiff's recovery.

EARLE, J. delivered the opinion of the court. In the only bill of exceptions filed in this cause, there are two opinions delivered by *Montgomery* county court, unfavourable to the claims of the appellant. In the one the court decide, that the lands attached are not subject to condemnation for the debt of the appellant; and by the other, they refuse on his prayer to instruct the jury, that the defendant had no right to set off against the appellant's claim for rents coming into the defendant's hands after laying the attachment, their demand for \$300 stated in their affidavit to have been overpaid *Beeding* on account of the personal estate.

Without examining or adopting the reasons assigned for either of those opinions, this court affirm this judgment.

The appellant was not entitled to have condemnation of any part of the property attached in this case, having

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failed to show himself of that description of persons who have a right to issue an attachment under the provisions of the act of 1795, *ch. 56*. By that act the remedy is confined to citizens of this state, or some other of the *United States*, and it no where appears on the face of this record, that the appellant is either the one or the other. On the contrary it appears, that he resides, and always has resided in *George Town*, in the District of *Columbia*, being neither a citizen of *Maryland*, nor of any other of the *United States*, but a citizen of that district or territory only. The case of *Shivers vs. Wilson*, determined in this court, (5 *Harr. & Johns* 130,) is decisive of this question, being a case in all respects analagous to this. There, as here, the plaintiff in the inferior court is described to be a citizen of the *United States*, without designating him a citizen of *Maryland*, or some of the *United States*, and his case was decided not to be within the provisions of the aforesaid act of 1795, *ch. 56*.

The appellant here having failed to bring his case within the provisions of that act, the court below were right in deciding that the lands attached were not liable to condemnation for his debt, and in refusing to give any opinion that might enable him to recover.

JUDGMENT AFFIRMED.

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W. B. obtains a judgment against *M.* in 1817. In 1819, *B C* also obtains a judgment against *M.* and issues a *fi. fa.* returnable in 1820, and on the day of issuing it, places it in the hands of the sheriff. On the return day the sheriff returns the *fi. fa.* laid as per schedule annexed, for a certain amount—residue of defendant's property secreted. In 1820 *B W* also obtains a judgment against *M.* upon which a *ca. sa.* is issued, and served on *M.* and he, on the 5th of August 1820, is discharged under the insolvent laws of the district of *Columbia*, and on that day executes a deed of trust of all his property, under the said laws, to *G B M.* In 1819, *U B* sues out a *sci. fa.* on his judgment, and on the 14th of November 1820, obtains a *fiat* and immediately issues a *fi. fa.* which is laid on the property returned secreted, as above stated, being the property now in dispute. Replevin for this property is then brought by *G B M.* the trustee of *M.* against the sheriff, and the property by consent of all parties was sold, and the proceeds of the sale were to depend on the question which of the parties was entitled to a priority. Held, that *B C.* was so entitled, that the property was bound by his judgment from the time of the delivery of his execution to the sheriff, and that that lien was not destroyed by the return of the sheriff of the execution, but continued to attach to the property after its transfer to *M.*'s trustee.

APPEAL from *Montgomery* county court. It was an action of replevin, instituted by the appellee against the appellant, to recover a number of slaves. A case was stated for the opinion of the court below, upon which that court, (*Ridgely and Kilgour*, A. J.) decided in favour of the appellee. The facts of the case stated sufficiently appear in the opinion delivered by this court.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

F. S. Key, for the Appellant, contended, 1. That the

Bank of *Columbia*, by the delivery of their *feri facias* to the sheriff in March 1820, acquired a lien on the negroes in question, which no act of the debtor could divest.

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2. That *George Magruder*, by his conveyance to his trustee in August 1820, only gave him the negroes, as he himself, at the time of petitioning for the benefit of the insolvent laws, held them, subject to this lien. And

3. That this was a lien or incumbrance to be satisfied by the trustee, out of the proceeds of sale, previous to any distribution thereof among the general creditors. He referred to the *fifth* section of the act of congress of the 3d of March 1803, for the relief of insolvent debtors within the District of *Columbia*, ch. 84. *Warden vs. Arell*, 2 *Wash.* 296. *Pierce vs. Turner*, 5 *Cranch*, 154. And *Lambert vs. Paulding*, 18 *Johns. Rep.* 311.

Magruder, for the Appellee, cited *Rorke vs. Dayrell*, 4 *T. R.* 402. *Smallcomb vs. Cross*, 1 *Id. Raym.* 252. 1 *Esp. Dig.* 279, (392.) 2 *Selw. N. P.* (*Wheaton's ed.*) 1055, 1056. *Hendricks vs. Robinson*, 2 *Johns. Chan. Rep.* 283, 312. *Lowthal vs. Tonkins*, 2 *Eq. Cas. Abr.* 380, pl. 14. *Payne vs. Drewe*, 4 *East*, 523.

BUCHANAN, Ch. J. delivered the opinion of the court. This cause comes up on a case stated, the facts of which are, that at the November term of the *Montgomery* county court, in the year 1817, *The President and Directors of the Union Bank of George Town* obtained several judgments against *George Magruder* for large sums of money; that at the November term of the *Montgomery* county court, in the year 1819, *The President, Directors and Company, of the Bank of Columbia*, obtained a judgment against the said *George Magruder* for a large sum of money, on which judgment a writ of *feri facias*, returnable to the November term 1820, was sued out on the 8th of March 1820, and on the same day put into the hands of the sheriff; which writ of *feri facias* was returned by the sheriff, endorsed "laid as per schedule annexed for \$958 87½—residue of defendant's property secreted." That at the June term 1820 of the circuit court for *Washington* county, in the District of *Columbia*, *The President, Directors and Company, of the Bank of Washington*, obtained a judgment against the same *George Ma-*

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gruder, on which a *copias ad satisfaciendum* was sued out, and served upon him by the marshal of the district. That on the 5th of August in the year 1820, he was regularly discharged under the act of congress passed for the relief of insolvent debtors within the District of *Columbia*, and on the same day executed a deed to *George B. Magruder*, (the defendant below and now appellee,) who was appointed his trustee, for all his property, real, personal and mixed, which deed was regularly acknowledged and recorded, both in *Montgomery* county and in the District of *Columbia*. That on the 2d of April 1819, writs of *scire facias* were sued out by *The President and Directors of the Union Bank of George Town*, to revive the judgments they had obtained against *George Magruder* at the November term 1817, on each of which a *fiat* was entered at the November term 1820, on the 14th of that month, and on the same day writs of *fieri facias* were issued and placed in the hands of the sheriff; in virtue of which, on the 1st of January 1821, he seized the property which he had before returned "secreted," on the *fieri facias* that was issued on the judgment obtained by *The President, Directors and Company, of the Bank of Columbia*. That on the 2d of December 1820, another writ of *fieri facias* was issued on the judgment of the *Bank of Columbia*, which was also levied on the 1st of January 1821, on the same property. That the first execution issued on the judgment obtained by the *Bank of Columbia*, would have been levied upon the property so taken in execution on the 1st of January 1821, in pursuance of instructions given for that purpose, if it could have been found, and that it was secreted after the transfer by *George Magruder* of all his property to *George B. Magruder* as his trustee; that the property thus in the possession of the sheriff, the appellant, was replevied out of his hands by the appellee, who sold it by consent of the counsel on the part of the appellant, and the *Bank of Columbia*, and holds the proceeds, amounting to the sum of \$3100, as trustee of *George Magruder*, subject to be distributed according to law. There was a bill of exceptions taken at the trial, which was abandoned; and the case was made to try the question, whether *The President, Directors and Company, of the Bank of Columbia*, by delivery to the sheriff, previous to the application of *George Magruder* for the benefit

of the insolvent laws in the District of *Columbia*, of the *fieri facias* on the judgment they had obtained against him, acquired a lien on that property, which entitled them to be paid the amount of their judgment by the trustee, out of the proceeds of sales thereof, before any distribution among the general creditors; with an agreement, if the court should be of that opinion, that then a judgment should be entered up against the appellee for that sum.

The appellee derived all his authority, as trustee of *George Magruder*, from the insolvent laws of the District of *Columbia*, and must be governed by them in the execution of his trust. The *fifth section* of the act of congress of the 3d of March 1803, *ch. 84*, provides for the sale of the property of petitioning debtors, and directs that "the product thereof, after satisfying all incumbrances and liens, shall be divided among the creditors in proportion to their respective claims."

The President and Directors of the Union Bank of George-Town, most certainly acquired no lien on the property in question, by reason of the execution issued on their judgments being placed in the hands of the sheriff on the 14th of November 1820, all the property of *George Magruder* having been antecedently transferred to the appellee by the deed of trust of the 5th of August. But the personal property of a defendant being by the laws of this state bound from the time of the delivery of the writ of *fieri facias* into the hands of the sheriff, *The President, Directors and Company, of the Bank of Columbia*, acquired a lien, by the first execution on their judgment being put into the sheriff's hands on the 8th of March 1820, which was anterior to the application of *George Magruder* for the benefit of the insolvent laws. And the property in question was not discharged from the operation of that lien by the circumstance that the execution was in part levied on other property, because the sheriff was instructed to levy it on that particular property, and endeavoured to do so, but being secreted, he was unable to find it, and was constrained to make return on the writ that it was secreted, which sufficiently explains why it was not also levied on that property. And it would be attended with serious consequences to judgment creditors, if after the whole of a debtor's personal property became bound by delivery of an execution to the sheriff, the debtor, or any body else,

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could relieve any portion of it he pleased from the lien, by secreting it, and driving the sheriff to levy the execution only on what might be suffered to remain, no matter how inadequate to the object of the execution.

The provision in the *fifth section* of the law of congress, that "no process against the real or personal property of the debtor shall have any effect or operation, except process of execution, and attachment in the nature of executions, which shall have been put into the hands of the marshal antecedent to the application," cannot be so construed as to nullify the effect of the lien; that *The President, Directors and Company, of the Bank of Columbia*, had acquired, to the extent of their judgment on the personal property of *George Magruder*, before the time of his application, and to divest their debt of the priority which that lien would otherwise have given to it; but the delivery of an execution to the sheriff in this state, having the same effect to create a lien on the personal property of a debtor here; that the delivery of similar process to the marshal has, in relation to personal property within the District of *Columbia*, the sheriff, as the proper officer to execute such process here, must be considered as within the spirit and meaning of the act of congress, and the same preference given to liens, so created on personal property in this state, as to liens created on the same description of property in the District of *Columbia*, by the delivery of the execution to the marshal there: Or if that clause of the act of congress is to be understood as restricted to process issued within the district, and as denying effect and operation to such process only, if not put into the hands of the marshal before the application of the debtor; then the effect of the delivery of process of execution to the sheriff, on property in a state, is left to the operation of the law of such state. If either of these positions be true, the lien of *The President, Directors and Company, of the Bank of Columbia*, on the property of *George Magruder*, was embraced and protected by the general terms, "all incumbrances and liens," and the appellee took it under the deed of trust, subject to that lien, and the priority given to it by that act. And the question here is, whether that priority ceased with the return of the execution?

Whatever might, on general principles, have been the effect of the return of that execution, if *George Magruder*

had not applied for the benefit of the insolvent law, and the contest had been between *The President, Directors and Company, of the Bank of Columbia*, and some other creditor, who had put his execution into the hands of the sheriff before they had sued out another writ of *fiery facias*, this case must be governed by the particular circumstances attending it.

If the appellee had sold the property before the return of the execution, *The President, Directors and Company, of the Bank of Columbia*, would have been entitled to have their judgment first satisfied out of the proceeds of sale, they being the only creditors who had acquired a lien. That however was not done, but after the execution of the deed of trust, the particular property in question was secreted and kept out of the way of the sheriff, so that they could not reap the benefit of their lien, by way of execution, and were compelled to look to the trust fund. And if the preference given them by law was defeated by the return of the execution, as is contended, it could not afterwards be revived by issuing and putting into the hands of the sheriff another execution, which could not have the effect to create a lien against the deed of trust; and thus power would be given to trustees, either by negligence, or a gross violation of their trust, always to destroy the legal priority of a creditor who had obtained a lien, without any negligence or fault on the part of such creditor, which cannot be. A trustee under the insolvent law takes the property subject to all liens, and the preference given by that law to such liens; which preference follows the property as a trust fund, as long as it remains in his hands; he receives it, and holds it as a fund, in trust, by operation of law, first for the payment of the liens existing at the time of the execution of the deed of trust, which right of priority is no more liable to be affected or defeated by the negligence, delay, or acts of the trustee, than if they were claims particularly set out, and a preference expressly given to them in terms by the deed, but the trust being once raised for their payment, it must continue until they are satisfied, or the fund appropriated for that purpose is exhausted. This is just that case, and not like a mere contest between two judgment creditors for a preference under their respective executions; but the case of creditors seeking to obtain payment of their debt from a trustee holding pro-

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perty in his hands, which was conveyed to him in trust for that purpose; and having had, at the time the trust was created, a lien on the property that gave them in law a priority over other creditors, the trust is virtually, as if it had been expressed to be for the payment, first of that debt setting it out in terms.

We can discover nothing in the record by which that priority has been lost or destroyed, and think that *The President, Directors and Company, of the Bank of Columbia*, are entitled to have the amount of their judgment paid before any distribution is made among the general creditors; the trustee not having it in his power to defeat the object of the trust, by delaying to sell the property, which was kept out of the way of the sheriff, until after the return of the execution, and the trust continuing the same as it was originally created, whether the property was sold or not.

JUDGMENT REVERSED.

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S. & R. W. WEST vs. BISCOE.

Family settlements are to be construed most favourably to promote and effectuate the intentions of the party settling.

The statute of uses, of 27 Hen. VIII. ch. 10. affects a deed of bargain and sale no farther than to vest the legal estate in the bargainee.

H W conveys her real estate by a deed of bargain and sale, to *W B*, in trust for her two sons, *R* and *S W*, "provided that they shall, before they receive any benefit or interest under the trust, pay, or cause to be paid, or secure to be paid, £500, to each of her two granddaughters *M O*, and *H O*."—Held, that the £500, were a charge on the estate.

If *R* and *S W*, take possession of the estate under such a conveyance, they became personally liable for the £500, and may, in equity, be enforced, personally to pay it.

Where the deed makes the said £500, payable to the granddaughters on their arrival at the age of 16 years, or on their marriage, and they do arrive at that age, or marry, before the sons *R* and *S W* take possession of the estate conveyed, the right to the £500, is a vested right, and becomes payable to the granddaughters, or their representatives, on *R* and *S W*, taking possession, with interest thereon from the time the granddaughters did so respectively arrive at the age of 16 years, &c.

One of the granddaughters having married and died in the life-time of her grand-mother, her portion survived to her husband.

Under what circumstances a bill may be taken *pro confesso* against one of the defendants,

APPEAL from *Prince-George's* county court, sitting as a court of equity. The bill of the complainant, (now appellee,) filed against *William Beanes*, and *Stephen* and *Richard W. West*, (the appellants,) on the 16th of September 1818, stated, that on the 9th of April 1798, *Hannah West*, deceased, being seized of a large real estate, by deed conveyed to said *Beanes*, his heirs and assigns, all her real estate, in trust for her own use during the term of her natural life, and from and after her death to be equally divided between her sons, the said *Stephen* and *Richard W. West*, as tenants in common, in tail. That the trust so created for the benefit of *Stephen* and *Richard* was, upon the express proviso and condition that they should, before they received any benefit thereof, or estate or interest therein, pay, or cause to be paid, or secure to be paid, the sum of £500 current money to each of the grand-

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daughters of the said *Hannah*, to wit, *Maria Oden*, and *Hannah Oden*, at their arrival at the age of sixteen years, or day of marriage, which ever should first happen; that is, the said *Stephen* and *Richard* were to be respectively liable each to pay £250 current money to each of the said granddaughters. That on the 31st of January 1812, the said *Hannah Oden* arrived at the age of sixteen years, and on the 1st of October 1812, intermarried with the complainant, who became entitled to receive of the said *Stephen* the said sum of £250, and of the said *Richard* the said sum of £250; the condition of the estates granted in trust for their use as aforesaid being the payment of the said sums of money; and which estates the said *Stephen* and *Richard* agreed to accept upon that condition. That the right and interest of the complainant's wife was and became a vested, and not a contingent interest, at the execution of the said deed by the said *Hannah West*, and that no subsequent circumstances could preclude her, or her legal representatives, from claiming or receiving the same when the period of payment arrived. That on the 8th of October 1813, *Hannah*, the wife of the complainant died, and thereupon the right to the said sum of £500 devolved upon the complainant. That in April 1815, *Hannah West* also died, and *Stephen* and *Richard* thereupon took possession of the estates granted to them as aforesaid, in trust for their use, according to the form of the gift and conveyance aforesaid, and now hold and occupy the same; but neither the said *Stephen* and *Richard* then, nor when the complainant's wife arrived at the age of 16 years, nor on the day of her intermarriage aforesaid, nor since those periods, paid, or cause to be paid, to the complainant's wife, or to the complainant, or secured to be paid, the said sums of current money in the said indenture specified, in pursuance of the condition therein stipulated, which condition enured to the benefit of the complainant's wife during her life, and to the complainant as aforesaid since her death; nor hath the said *William Beanes* taken any steps, or instituted any proceedings at law or in equity to compel the said *Stephen* and *Richard* to comply with and perform the condition aforesaid, by the payment of the said sums of money, with interest thereon, or by giving security to pay the same; but the said *Stephen* and *Richard*, (although thereto often requested,) and each of them, have, and hath hitherto wholly

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refused; &c. *Prayer*, that *Beanes* may be enforced to execute the trust, and that *Stephen* and *Richard* may be compelled to pay to the complainant the sums of money respectively due from them and unpaid, &c. The *subpœna* which issued against the defendants was served on *Stephen West* only, and on his nonappearance at the return day, (April 1819,) an attachment of contempt was ordered and issued against him, and the *subpœna* renewed against the other defendants, returnable to the September term 1819. At that term these process were returned not executed, and the cause was continued until the following term. At the next term, (December 1819,) the cause was further continued until April following. At the last mentioned term, (April 1820,) neither of the defendants appearing, the attachment and *subpœna* were again renewed, returnable to the following June term, when the sheriff returned that he had attached *Stephen*, and summoned the other defendants. On motion of the complainant, the sheriff was ordered to bring into court, at the next term, the body of the said *Stephen*, and attachments of contempt were ordered and issued against the other defendants. At the next term, (September 1820,) the sheriff produced the body of *Stephen*, who appeared by his solicitor, and it was ordered that he answer the bill. No return was made of the attachments against the other defendants, and the cause was continued until the next term. At that term, (December 1820,) the complainant and *Stephen West* appeared, and *Stephen* not having answered the bill, nor the sheriff returned the attachments against the other defendants, the cause was continued until the next, and in like manner to the two succeeding terms. At September term 1821, *Beanes* and *Richard W. West*, having been attached, appeared, and answered the bill. By the answer of *Richard W. West* he admits the facts as stated in the complainant's bill, (so far at least as they relate to the dates or documents referred to in the bill,) to be true, but states that he never received any advantage from the property conveyed to his brother and himself, until after the decease of his mother, in 1815, and that the property has not yet been divided between his brother and himself. That he was not aware that he was in law or equity liable for the payment of the money demanded by the complainant, more especially as he always considered the claim unfounded, either in ho-

hour or justice. *Beanes*, by his answer, states that he was named as the trustee in a certain deed executed by *Hannah West*, of the purport of the deed exhibited by the complainant with his bill. That he is not interested in the event of the said suit, and as for the facts stated in the said bill, that it is incumbent on the complainant to prove them, if disputed by the other defendants, who only are interested, he having no precise recollection of the dates referred to; and he prays he may be hence dismissed, &c. The cause was then continued to the next, and to the succeeding terms, *Stephen West* still being in contempt for not answering the bill. At April term 1822, it was on motion, ordered that *Stephen West* answer by the fourth day of the following term, and on the service of the order on him, and his default to answer by that time, that the bill as to him should be taken *pro confesso*. At the next term, (September 1822,) the defendants filed in court a copy of the will of *Hannah West* (admitted to have been 82 years of age in 1815, when she died,) dated the 24th of November 1813, and executed in the presence of one witness only, whereby among other things, she gave and bequeathed to her son *Richard W. West*, "all the remaining part of all my estate and property of every nature and kind, which is not herein otherwise disposed of, of which I may die possessed or entitled to." On motion of the complainant, the court [*Stephen*, Ch. J. and *Key*, A. J.] passed the following decree: "The bill, answers and exhibits, in this case being considered by the court, and the bill as against *Stephen West*, one of the defendants, being taken *pro confesso*, it is thereupon adjudged, ordered and decreed, this 9th of September 1822, by the said court, that the said *Stephen West* pay to the complainant the sum of £250 current money, with legal interest thereon from the 31st of January 1812, till paid; and that the said *Richard W. West* pay also unto the complainant the like sum of £250 current money, with the like interest thereon; and that the said *William Beanes* be hence dismissed with his reasonable costs." From this decree *Stephen* and *Richard W. West* appealed to this court.

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The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, and ARCHER, J.

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Taney, Magruder, and F. S. Key, for the Appellants, stated, that the complainant in the court below claimed relief under the deed executed by *Hannah West* to *William Beanes*, in two ways—1st. By compelling *Beanes* to execute the trusts alleged to be contained in the deed in favour of the complainant. 2d. By compelling the other defendants to pay the money provided for in the deed. The decree of the court below gave him relief in this latter way. They contended that the decree was erroneous,

1. Because the defendants, *S* and *R. W. West*, by accepting the property mentioned in the deed, came under no personal liability to pay the money claimed by the complainant.
2. If they did, the remedy was at law.
3. The complainant has no remedy either at law or in equity against any of the defendants.

4. That the deed exhibited is not a deed of trust. That conveying the estate to *Beanes* for the use of the other defendants, the use became executed by the statute, and they would take the estate, but for the payment of or securing the £500 being a condition precedent to the vesting of the estate. That this condition never having been performed, the estate never passed out of the grantor by this deed, but remained in her by reason of the nonperformance of the condition upon which it was limited to take effect till her death, and then passed to the devisee under her will.

5. That the *Wests* were not bound to pay until the estate came into their possession; and that the complainant's wife dying before then, her interest lapsed.

6. The bill taken *pro confesso* against *Stephen West* is irregular.

On these several points they cited 2 *Blk. Com.* 336, (and *Christian's note.*) *Preston on Estates*, 184, 190. *Doe vs. Leicester*, 2 *Taunt.* 109. *Phipps vs. Mulgrave*, 3 *Ves.* 613. *Chandos vs. Talbot*, 2 *P. Wms.* 612. *Roundell vs. Currier*, 2 *Bro. Chan. Ca.* 67; and *Cooper's Plead.* 14.

Jones and R. Johnson, for the Appellee, cited *Boraston's case*, 3 *Coke*, 19. *Fearne Con. Rem.* 318. *Thomas's Lessee vs. Wootton*, 4 *Harr. & M. Hen.* 428. 2 *Blk. Com.* 165, 335, 336, 337. *Attorney General vs. Christ's Hospital*, 3 *Bro. Chan. Ca.* 165. *Hooley vs. Booth*, 2 *Vern.* 359. *Bacon vs. Clerk*, 1 *P. Wms.* 478. *Prec. in Chan.* 500, *S. C.* *Bland vs. Middleton*, 2 *Chan. Ca.* 1. *Attor-*

ney General vs. Floyer, 2 Vern. 749. 2 Com. Dig. tit. Chancery, (4 W. 18.) 707. *Miles vs. Leigh*, 1 Atk. 575. *Adair vs. Shaw*, 1 Sch. & Lef. 243. The act of 1785, ch. 73, s. 19.

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EARLE, J. delivered the opinion of the court. The deed of trust from *Hannah West* to *William Beanes*, contains a settlement of her landed estate on her family, and is to be expounded most favourably to promote and effectuate her intentions. It is a deed of bargain and sale, and the uses raised thereby are not operated upon by the statute of uses, further than to vest the legal estate in fee in *William Beanes*, subject to the trusts therein mentioned, which are all executory. The chief object of the settlement is to preserve the estate to her sons, and their children, and to transmit it to the latter unincumbered with debts. Next to this in importance is the provision for securing the payment by her sons to her granddaughters, of portions of £500 each, payable when they shall arrive at 16 years of age, or marry. Both these objects are intended to be answered through the instrumentality of the trust estate, by conveying the lands to the trustee, and his heirs, to hold the same in moieties for the use of her sons, *Stephen West* and *Richard W. West*; provided that they shall, before they receive any benefit or interest under the trust, pay, or cause to be paid, or secure to be paid, five hundred pounds current money to each of the granddaughters, *Maria Oden* and *Hannah Oden*, at their arrival at the age of sixteen years, or day of marriage, which shall first happen. At the time of the settlement *Hannah West* was an old woman; but having lived to a very advanced age, she unexpectedly to herself outlived her granddaughter *Hannah Oden*, who arrived at the age of 16 in the spring of 1812, married the complainant, *George W. Biscoe*, in the fall of that year, and died the succeeding fall. *Hannah West* departed this life in 1815, and her sons, *Stephen West* and *Richard W. West*, immediately after took possession of her landed estate, and have continually enjoyed it since, without having paid, or secured to be paid to their niece, *Hannah Oden*, or her representatives, the portion of £500, or any part of it. In 1818 *George W. Biscoe*, the surviving husband, filed his bill in *Prince-George's* county court, on the equity side thereof, against *William Beanes*, the trus-

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tee, and the sons *Stephen West* and *Richard W. West*, to enforce the execution of the trust, and to compel the said *Stephen West* and *Richard W. West* to pay to the complainant the portion thus given to his deceased wife. The facts of the bill are not denied by the answers of the trustee, and *Richard W. West*, and they are taken *pro confesso* against *Stephen West* for the want of an answer. The chancery jurisdiction below decreed a dismissal of the bill as to the trustee, and a payment of the portion, with interest by *Stephen West* and *Richard W. West*, considering them under a personal obligation in equity to pay it. This decree this court have to revise and decide upon, and particularly they have to decide, whether it can be sustained as an adjudication *in personam*.

The court have reflected maturely on this case, and have examined all the authorities within their reach, that have any bearing upon it. That the portion claimed is a charge in equity upon the estate conveyed in trust, we have no question, although the grantor has not in express terms made it so. The clause directing it to be paid, or secured to be paid, before her sons entered upon the beneficial use of the estate, was evidently introduced in favour of her granddaughter, to accelerate the payment to her, and strongly implies a charge upon the estate, and particularly in the event of the sons refusing to accept it, on the ground of its insufficiency to pay the portion. That the clause is to be viewed in this light, is amply proved by the authorities, and more especially by the case of *Wallis vs. Crimes*, to be found in 1 *Cases in Chan.* 89, which, as to this point, may be considered a parallel case, and will therefore be circumstantially adverted to. The father of *Sir George Crimes* conveyed his estate to trustees in fee, upon the trust, that if *Sir George*, within six months after his father's death, secured to the trustees £500 for the benefit of *Sir George's* younger children, then (after such security first given to the trustees) to convey the premises to *Sir George* and his heirs; and until the time limited for giving the security, the trustees to stand seized to the use of *Sir George's* eldest son, (*Sir Thomas Crimes*,) for his maintenance; and in default of such security, the trustees, at the request of *Sir George's* eldest son, to convey to him. Without giving the security, or in any way respecting the trust, *Sir George* entered upon the estate, and considering it as

his absolute property, demised it for a long term of years, by way of mortgage, to secure the payment of a sum of money, and died. The executors of the mortgagee exhibited their bill against Sir *Thomas Crimes*, and the trustees, to enforce a redemption, or to hold discharged of equity, and the court of chancery decreed, upon a view of all the facts, including the conveyance in trust, that the executors hold and enjoy the premises as a security of the mortgage money and interest, against the defendants, and all claiming under them, *charged with the £500* to Sir *George Crimes's* younger children, from the time the plaintiff came into possession, unless the defendant, Sir *Thomas Crimes*, should pay the mortgage money and interest, by a given day. Upon a bill of review, Lord Keeper *Bridgeman* refused to reverse the decree, and declared he looked upon the condition precedent to be in the nature of a penalty, and that he would regard the intent of the trust, which was to secure the £500 to the younger children.

If the portion claimed by the surviving husband is thus a charge upon the land, is he constrained to follow it in the hands of the trustee; and is he, without remedy in equity against *Stephen West* and *Richard W. West*, on their personal obligation to pay it?

We have to confess, that we should regret to find ourselves under the necessity of answering either branch of this proposition in the affirmative, for we verily think, the appellants are bound in conscience to fulfil the wishes of their aged parent, and to pay this portion, according to her intentions, unequivocally expressed in the settlement. We do not, however, feel ourselves under any such necessity, entertaining decidedly as we do the opinion, that the proceeding *in personam*, and the decree thereon, may in the particular circumstances of this case be sustained on the strictest principles of equity. The legal estate in the lands of *Hannah West*, is by the deed vested in the trustee, who holds them for the use of *Stephen West* and *Richard W. West*, which use (distinguished in the trust deed by the epithets "benefit, estate, interest,") they were not to enjoy under the trust, until they had paid, or secured to be paid, the portion in controversy. They nevertheless, wholly unmindful of the terms of the settlement, entered as before mentioned into the possession and enjoyment of the granted premises, and had the use of

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them, and the actual permanency of the profits, for several years before the bill exhibited, and from thence arises, as we think, their personal responsibility to pay the portion sued for by the appellee.

If *Stephen West* and *Richard W. West* had refused to accept the grant upon the terms of the settlement, it would have become the duty of the trustee to interpose, to secure the granddaughter's portion, as it was perhaps his duty to see the portion paid, or secured to be paid by them, before he permitted the enjoyment of the use. They did not, however, refuse the grant, but on the contrary accepted it, by taking possession of the estate, and enjoying the use; and they thereby admitted its adequacy to pay the portion of the granddaughter. This brings the case within the reason of the case of *The Attorney General vs. Christ's Hospital*, reported in 3 *Brown's Reports*, 165, although that case should be said not to agree in all its facts with this. The condition there, was to be performed subsequent to the acceptance of the devise, whereas it is objected here, that the condition is precedent, and that the interest did not vest until the condition was performed.

However this objection might have availed, if *Stephen West* and *Richard W. West* had refused to accept the grant upon the terms of the settlement, it can have no influence on the present decision, when it is considered, that they have had for years the possession of the estate, and the full enjoyment of the use, in the same manner, and precisely as if they had performed the condition by paying, or securing to be paid, the granddaughter's portion. Instead of paying and possessing, they have chosen to possess without paying; and surely it cannot but be in accordance with the best principles of equity jurisprudence, to compel them to pay. The possession of the devised property bound *Christ Hospital* to a performance of the condition annexed to the devise; and in like manner, the possession and enjoyment of *Stephen West* and *Richard W. West*, of the use designed for them, should bind them to a performance of the condition, which ought to have been performed precedent to their possession. The distinction between those two kinds of conditions, as to relief, is more over trifling, if not nominal, where the case lies in compensation, as this unquestionably does. See *Francis's Maxims*, 49. 1 *Fonbl.* 211, 218, and the cases there cited.

After the day of payment, the acceptance of compensation may be enforced, to vest the estate in the party not performing, and on principles of reciprocity he should be coerced to make compensation; where by his own act he becomes possessed of, and has the fruition of the estate.

The opinion that the appellants are under a personal obligation to pay the portion of *Hannah Oden*, to her husband and representative, receives strength, we think, from other considerations. They have fully admitted the sufficiency of the granted premises to pay the portion, but the admission does not make it so, nor does it in any manner appear that it is so. If it is inadequate, the rents and profits must supply the deficiency, and as they have been the receivers for years, they have made themselves personally liable to pay it. These receipts are too within purview of the bill, which charges that *Stephen West* and *Richard W. West* accepted the grant, and possessed themselves of the granted premises, and have had the enjoyment of them, and prays that they may be compelled to pay. Again, if they had performed the condition, by securing the portion to be paid to *Hannah Oden*, on her arrival at the age of 16, or day of marriage, which should first happen, they would have incurred a personal responsibility within the contemplation of the settlement; and it seems consonant to justice, that they should be exposed to a like liability, by voluntarily placing themselves in the same situation, and taking to themselves the same enjoyments, as if they had performed the condition. The decree below we think right, and therefore we affirm it.

DECREE AFFIRMED.

CULLUM vs. BEVANS.

APPEAL from *Baltimore county court*, from a judgment rendered in favour of the defendant in that court, in an action of replevin.

The cause, which is fully stated in the opinion delivered by this court, was argued before BUCHANAN, Ch. J. MARTIN, STEPHEN, ARCHER, and DORSEY, J. by

In this state it is the proper remedy in all cases where a plaintiff has a right to the possession of personal property.

In such an action in this state the plea of property in the defendant throws the whole burthen of proof on the plaintiff.

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Replevin in this state, is a much more extensive remedy than it is in England.

In England, the tortious taking from the plaintiff, is the gist of the action, and if put in issue, must be proved by the plaintiff.

to the possession of

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R. Johnson, for the Appellant, who, having abandoned the first bill of exceptions taken in the court below, referred to *Robertson vs. French*, 4 *East*, 130, and 1 *Phill. Evid.* 118, (123,) in support of his objection to the opinion of the court below, as stated in the second bill of exceptions. He contended, that the plea of property in the defendant was sufficient evidence of possession in the plaintiff, and that possession was proof of property without any other evidence to establish the plaintiff's title.

No counsel appeared for the appellee.

DORSEY, J. delivered the opinion of the court. Two bills of exceptions were taken in this case, the first of which, being abandoned by the appellant's counsel, the court are relieved from the necessity of giving any opinion upon it. The question, presented by the remaining exception, is one, on which if any doubt had existed about it, it is to be presumed must have been frequently presented for adjudication to the several courts of law of original jurisdiction in this state; and in at least two of the judicial districts, decisions have been made in unison with the opinion of the court below, from which no appeal was ever made. The case at bar has arisen on an action of replevin, instituted in *Baltimore* county court, by the present appellant, against the appellee, for the recovery of a day book and ledger. The appellee appeared to the suit, and plead property in himself; to which plea a replication was filed, and the issue joined in the usual form. Upon the trial, neither party offering any testimony, the plaintiff's counsel prayed the court to instruct the jury, that upon the pleadings in the cause he was entitled to recover. This instruction being refused, the appellant appealed, and alleges, that by such refusal the court below committed an error, which this court are now called on to revise and correct. In support of this appeal it has been urged (by a species of reasoning more specious than solid,) that possession of a chattel is *prima facie* evidence of property; that the appellee, having plead property in himself, thereby admits the taking charged in the declaration, and consequently, the original possession to have been in the appellant; and that such original possession is sufficient evidence of title to recover, unless a better right in the defendant shall be shown by proof. If this case were pending in an *English* court

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of judicature, this ingenious system of reasoning might not be susceptible of easy refutation; although, if it be sound doctrine, it cannot well be understood how the plea of property in a stranger can be sustained as a plea in bar or justification of the invasion of a plaintiff's possession, and the taking from him goods by a defendant, a mere volunteer, deriving no right or authority from such stranger. That such a plea in bar is a good defence, and if true, defeats the plaintiff's right of recovery, is not now to be questioned. But to decide the question now before the court, it is not necessary to make an elaborate research into *English* authorities. The action of replevin, as prosecuted in this state, gives a much more extensive remedy than can be had in the same kind of proceeding in *England*. There, the tortious taking from the plaintiff by the defendant is the gist of the action, and no such action can be sustained but upon actual proof thereof, if the fact be put in issue by the pleadings. Not so in the state of *Maryland*. Here it is an almost universal remedy, applicable to all cases, where the plaintiff has a right to demand the possession of goods or chattels withheld by another, and which are within the reach of the process of the court. Although the form of the declaration has not been changed, the allegation of a wrongful taking is a mere fiction, generally false in point of fact, and evidence of nothing in support of the plaintiff's claim. On the contrary, the possession of the defendant, admitted by instituting the suit against him, is *prima facie* evidence of ownership, and the plea of property in the defendant throws the whole burthen of proof upon the plaintiff.

That the view which has been taken of this subject is the correct one, is clearly evinced by reference to the act of assembly of 1785, *ch.* 80, *sec.* 14; which directs the court to award to the defendant a return of the goods replevied, in all cases save where it shall appear that "the defendant's possession was forcibly or fraudulently obtained, or that the possession, being first in the plaintiff, was got or retained by the defendant, without proper authority or right derived from the plaintiff." Such a provision never would have been incorporated in that act of assembly, under a supposition of an actual wrongful taking from the plaintiff's possession, nor unless the presumption of right, both in law and in fact, had been im-

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puted to the defendant. Indeed, it is apprehended, that the pleadings in this cause afford conclusive evidence of the truth of the position which has been assumed. No principle in the law seems more universal, or better established, than that the *onus probandi* rests on the party who maintains the affirmative side of the issue. On what then is the issue joined in this case? It is not on the defendant's plea of property, but upon the replication filed by the plaintiff, asserting the right of property to be in himself, and tendering an issue on that point. He must therefore support his allegation by proof.

We concur in the opinion delivered by the court below; and affirm their judgment:

JUDGMENT AFFIRMED.

JUNE

LEMONNIER vs. GODFROID'S Adm'rs.

W. G. by his will bequeathed as follows: "I order my executor, hereafter named, to reserve from my estate the sum of \$6000, as a legacy to be paid to *W. G.* aged about 14 years, and christened under that name, at *Havanna*, in May or June 1804, which youth I acknowledge to be my natural son; I order my executor to invest the said sum of \$6000, in such way as to produce an interest for the support and maintenance of the said *W. G.* until he is of age, and then to pay him the capital or part remaining, in case the interest would not be sufficient for his maintenance during his youth"—*Held*, that the legacy to *W. G.* the son, was vested at the death of the testator.

APPEAL from a decree of the orphans court of *Baltimore* county, upon the petition of the appellees, against the appellant, as guardian of *William Godfroid*, junior, whom they represent as administrators. *William Godfroid*, the father of *William Godfroid*, junior, died in April 1818; having in November 1817 made his will, in which he declares *William Godfroid*, junior, to be his son, saying that he was then about 14 years of age, and bequeaths to him, in the manner hereafter to be stated, the fund which is the subject of the claim of the appellees in their petition. In 1821 or 1822, *Wm. Godfroid*, junior, died; and in May 1822, the appellees filed their petition against the appellant, as guardian, demanding the sum bequeathed to *Wm. Godfroid*, junior, by his father, and which, by the accounts of the appellant, appeared to be in his hands as guardian. The words of *William Godfroid's* bequest to his son are, "I order my executor, hereafter named, to receive from my estate the sum of six thousand dollars, as a legacy to be paid to *William Godfroid*, aged about fourteen years, and christened under that name at *Havanna*, in the month of May or June 1804, which youth I acknowledge to be my natural son. I order my executor to invest the said sum of six thousand dollars in such way as to produce an interest for the support and maintenance of the said *William Godfroid*, until he is of age, and then to pay him the capital or part remaining, in case the interest would not

be sufficient for his maintenance during his youth." The will then proceeds to say, "after deducting from my estate the sum above mentioned, the rest of my property will be left at the disposal of *Eulalie Lacoste Godfroid*, my lawful wife, and my general and universal heir, who shall enter in and take immediate possession of my property, without any control whatsoever." The orphans court decreed that the appellant should pay over to the appellees the amount received by him for *William Godfroid*, junior, under the said bequest. From which decree he appealed to this court.

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The cause was argued before BUCHANAN, Ch. J. EARLE, STEPHEN, and DORSEY, J.

Taney, and *Mayer*, for the Appellant, contended, That the decree was erroneous, because the legacy given to *William Godfroid*, junior, was not a vested one, but lapsed by his death before his reaching 21 years of age, the time appointed for paying it to him. They cited 4 *Bac. Ab. tit. Legacies*, (E 2,) 393. *Hanson vs. Graham*, 6 *Ves.* 246, 249. *Walker vs. Shore*, 15 *Ves.* 122. *Blamire vs. Geldart*, 16 *Ves.* 314. *Lane vs. Goudge*, 9 *Ves.* 226. *Leake vs. Robinson*, 2 *Mer.* 386. *Pulsford vs. Hunter*, 3 *Bro. Chan. Ca.* 417, 419. *Hoath vs. Hoath*, 2 *Bro. Chan. Ca.* 3. *Killett vs. Dawson*, 1 *Bro. Chan. Ca.* 124, (note by Eden,) and *Walcott vs. Hall*, 2 *Bro. Chan. Ca.* 305, 306, (note by Eden.)

Mitchell, and *Glenn*, for the Appellees, cited 4 *Bac. Ab. tit. Legacies*, (E 2,) 393 to 399, &c. *Chandos vs. Talbot*, 2 *P. Wms.* 610. *Pawlet vs. Pawlet*, 1 *Vern.* 204. *Cave vs. Cave*, 2 *Vern.* 508. *Stapleton vs. Cheele*, *Ibid* 673. *Walcot vs. Hall*, 2 *Bro. Chan. Ca.* 305. *Fonnereau vs. Fonnereau*, 1 *Ves.* 118. 3 *Atk.* 645, S. C. *Branstrom vs. Wilkinson*, 7 *Ves.* 421. *Leake vs. Robinson*, 2 *Mer.* 386. *Atkins vs. Hiccocks*, 1 *Atk.* 500. *Elton vs. Elton*, 3 *Atk.* 504. 2 *Com. Dig. tit. Chancery*, (3 Y 15,) 578. *Ibid* (3 Y 8,) 563. *Batsford vs. Kebbell*, 3 *Ves.* 363; and *Hanson vs. Graham*, 6 *Ves.* 239.

STEPHEN, J. delivered the opinion of the court. In November 1817, *William Godfroid* made his last will and testament in writing, which contains the following clause: "I order my executor hereafter named, to reserve from

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my estate the sum of six thousand dollars, as a legacy to be paid to *William Godfroid*, aged about fourteen years, and christened under that name at *Havanna*, in the month of May or June 1804, which youth I acknowledge to be my natural son. I order my executor to invest the said sum of six thousand dollars, in such way as to produce an interest for the support and maintenance of the said *William Godfroid*, until he is of age, and then to pay him the capital or part remaining, in case the interest would not be sufficient for his maintenance during his youth." He then gives the residue of his estate to his wife, after deducting from the same the above mentioned six thousand dollars.

The question to be decided by this court is, whether or not the legacy to *William Godfroid* was vested or contingent? The intention of the testator is the polar star by which courts of justice are always guided in the construction of last wills and testaments; and that intention, to be collected from the whole will, shall prevail, provided it does not conflict with the settled and established principles of law. It is laid down to be law, in the case of *Fonnereau vs. Fonnereau*, that where a legacy is given to a legatee when he shall have attained the age of twenty-five years, and the income or interest is directed to be applied toward his education, and a part of the principal to learn him a trade, that in such case the legacy shall be deemed a vested legacy. Lord *Hardwicke* held, that the time limited in the will was not intended to postpone the vesting of the legacy, but only the payment of it. Where the testator gives interest in the mean time, he gives a property in the principal, unless there be something on the face of the will to prevent its having such an operation, and the cause is, that the interest arises from the principal, and accrues by reason of it. But where maintenance is directed in the interim, it does not produce the effect of vesting the legacy, because it does not arise out of the principal, and has no necessary connexion therewith. It has been contended, that where the time of payment is limited *in futuro*, there must be words of present gift to make the legacy vest. As has been already observed, the intention of the testator is always to prevail, where the reason and policy of the law do not forbid it; and wills in favour of such intention, are always to be benignly construed. Wherever, therefore, there are strong circum-

stances to be collected from the will, indicating the intention of the testator to be, that the interest in the bequest shall immediately vest, although there be a future time fixed for payment, such intention shall prevail, although words of immediate gift are wanting. In this case the testator directs that the sum of six thousand dollars should be reserved or set apart from his estate as a legacy to his son, to be invested in such manner as to produce an interest for his support and maintenance until he arrived at age, and that then the principal, or so much as remained of it, should be paid to the legatee. The testator here has given no direction as to the amount of interest so to be appropriated, but directs generally the interest to be applied to the support and maintenance of the legatee, and to those objects only, and it seems to be clear beyond controversy, that where the whole interest is so directed to be applied, the effect in legal operation is the same, as if the interest itself were given; in which case it seems to be conceded, that the legacy would undoubtedly vest. And not only has the testator contemplated the application of the entire interest to the purposes designated in his will, but he further contemplated, that those objects could not be attained without a partial appropriation of the principal, which alone, without mentioning any part of the interest, he directs to be paid to the legatee on his arrival at the age of twenty-one. It is then the opinion of this court, that the legacy of six thousand dollars vested in *William Godfroid* on the death of his father, and that the decree of the orphans court of *Baltimore* county be affirmed, with costs to the appellees.

DECREE AFFIRMED.

DARNE and GASSAWAY vs. CATLETT, et ux.

JUNE.

APPEAL from the court of chancery. *Charles Gassaway*, the father of the female appellee, died in the year 1816,

G. by will bequeaths, among other things, as follows: "I give and bequeath to

my executors herein after named, or the survivor of them, the sum of \$6000, to be put to interest, or vested in some stock or funds, within one year after my decease, and the interest arising therefrom, I direct my said executors to pay annually to my daughter P. G. for and during her natural life, if in the opinion of my said executors, or the survivor of them, it should be necessary for her decent support; and upon the decease of my said daughter, I order and direct the said sum of \$6000, with the interest accrued thereon, if any should remain unexpended, to be equally divided among the three children of the said P. G. (his daughter.)"—*Held*, 1. That though the executors abuse their trust by not paying to P. G. the interest on the \$6000. (she being in a situation to need it, for her decent support,) and by not investing the 6000 dollars as directed by the bequest, they are not liable to pay interest on that interest, unless it is proved that they had appropriated the bequest, or the proceeds thereof, to their own use, or in some way made profit therefrom, or subjected them to hazard.

2. That the executors were not bound or authorized to invest the accruing interest on the \$6000, which might remain in their hands unappropriated to the support of P. G., but were bound to hold the same to be applied to P. G.'s support, as her wants might require—and

3. That in a bill by P. G. and her husband, against the executors, to enforce the trust created by the bequest, it is not necessary to make the children of P. G. parties.

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having by his will, among other things, bequeathed as follows: "I give and bequeath to my executors hereinafter named, or the survivor of them, the sum of six thousand dollars, to be put to interest, or vested in some stock or funds within one year after my decease; and the interest arising therefrom, I direct my said executors to pay annually to my daughter, *Polly Catlett*, (the female appellee,) for and during her natural life, if in the opinion of my said executors, or the survivor of them, it should be necessary for her decent support; and upon the decease of my said daughter, I order and direct the said sum of six thousand dollars, with the interest accrued thereon, if any should remain unexpended, to be equally divided among the three children of the said *Polly Catlett*, namely *Deborah Edwards*, *Eliza Dorsey*, and *Evelina Dorsey*, or the survivors of them." The appellants were appointed the executors of this will, and took upon themselves the execution thereof. The appellees filed a bill in chancery, praying that the appellants might be made to account with them for the interest which was then due, and to invest the \$6000 in some profitable stock or fund, as directed by the will, and that they also might be made to pay the interest of the same annually to *Polly Catlett*.

The case is more fully stated by the chancellor in his decree. Testimony was taken under a commission issued for that purpose, but as it relates solely to the fact, whether the female appellee had been, and was in a situation, to require for her decent support the payment to her of the interest on the legacy, it is useless to detail it.

JOHNSON, Chancellor, (March Term 1823.) *Charles Gasaway*, the father of *Polly Catlett*, one of the complainants, possessed of a large estate, by his last will and testament, dated the 18th of November 1816, gave the same to each of his children, except his daughter *Polly*, who appears from the proceedings to have married without his approbation, or that since her marriage the conduct of her husband was such that her father was not willing to confide in him, or to give her any property that might be under, or subject to his control. Still solicitous to make a provision for her decent support, in his will he makes the following bequest: (*He here stated the bequest.*) The complainants, in their bill allege, that the payment of the in-

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terest of the \$6000 is necessary for the decent support of *Polly Catlett*, but that she has only received one year's interest on \$2000. That the defendants, *Darne* and *Gassaway*, the executors named in the will, and who accepted the trust, not only refuse to pay the interest, but have failed to place the \$6000 out on interest, or invest the same in stock or funds: That *Darne* has appropriated \$2000 of the money to his own use, and *Gassaway* the balance. It is admitted by *Darne*, in his answer, that he has retained \$2000 of the money in his hands, and that he expects to pay legal interest on the money, and that one year's interest has been paid by him to Mrs. *Catlett*. The reason he assigns for his conduct is, that soon after the testator's death, "he was informed that *Polly Catlett* had declared that she would not receive the money; whereupon he, and *Charles Gassaway* the other executor, determined to make such an application of the said interest as would enable them to meet such a state of the said *Polly Catlett's* circumstances as seemed to have been looked to by the testator, should such an event happen;" but on hearing that she wished to receive the interest on that part of the "fund retained by him," he sent her one year's interest, which she accepted. That "he supposed it might contribute to her happiness, and was not then advised that it was unnecessary for her decent support, he was willing to believe he should be justified in thus exercising his discretion." The answer then proceeds, that it is "his solemn conviction, that any decree or act by which the trustees will be deprived of the discretion given to them, will be palpably opposed to the will and intention of the testator, and defeat the just purposes and objects of the devise." *Charles Gassaway*, in his answer, also admits that he has retained in his possession the other \$4000, and states, as his reason for not paying the interest, that "he don't believe that any part of the proceeds of the funds is necessary for the decent support of *Polly Catlett*, at this time, but on the contrary he verily believes, that to pay to her at this time one farthing of the proceeds, would be to deliver it into the hands of the complainant, *Grandison Catlett*, by whom it would be most grossly misapplied, to the injury of said *Polly Catlett*, and her children, who were principally intended by the testator to be provided for, by the said devise." The answer further states, that the defendants were de-

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sirous to be able, from the proceeds of the said fund, to make some provision for the said *Polly Catlett*, when, from the unbounded indiscretion of the said *Grandison Catlett*, she shall be *left so destitute as really to need it*, for her decent support. That he knew his father never intended that any part of the fund should come "to the hands of the said *Grandison Catlett*, as he did not think him trust worthy, and the defendant regrets, that he is constrained to add to that opinion, the testimony of his own experience." On those grounds stated in the answers, the defendants resist the right of the complainant, Mrs. *Catlett*, the sister of one of the defendants, and the sister-in-law of the other, to partake in the slightest manner of that provision, designed by her father, not only to prevent her from suffering for the want of the necessaries of life, but to enable her to make a decent appearance, suitable to one of his daughters. So far from the indiscretions of her husband presenting barriers to her right to the fund, it was them that caused the disposition in her favour to have been guardedly made by the will. But for his conduct and deportment, but for the want of the same confidence in him, that was placed in his other children, and his other sons-in-law, his bounty towards her would have flowed to her direct. The benevolence of the executors would not have been called on to watch her situation, and to extend the bounty of the father towards her, in such a manner as to be out of the control of the husband; and at the same time so as to extend to her a decent support. Neither of the defendants pretend to aver that she was in that prosperous situation as not to need her father's bounty, and the evidence clearly proves that she stands in need of it; but those executors, who profess so great a respect to her father's will, not only refuse to pay to her the interest, but disregarding the other provisions of the testament, take to themselves the funds; neither let them out on interest, nor invest them in productive funds. It was their duty to have put the money out at interest, or to have invested it; and if the interest, or the dividends of the stock, was not applied towards her decent support, *that* also should have been invested or applied in a way most advantageous for the children. The discretion placed by the testator in the executors would never have been confided in them, could he have anticipated the manner in which it has been abused. He never could have

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supposed that this son, to whom he had been so bounteous by his will, would have kept from his sister, that which was necessary for her support, least a portion of it should be squandered away, "from the unbounded indiscretion" of her husband. Her father was aware of that indiscretion; the manner in which the provision for her is made, was predicated on that circumstance. It would be strange in the extreme, if the support he designed for her should be defeated on account of the deportment of her husband, when that was the cause of the guarded provision itself. He never could have conceived that his executors would have suffered his daughter to want, because it was their solemn conviction that any decree or "act, by which the trustees will be deprived of the discretion given to them, will be palpably opposed to the will and intention of the testator, and defeat the just purposes and objects of the devise." Nor would he have ever placed the trust in them, could he have conceived they would have kept the money to their own use. Trustees are peculiarly under the control of this court, and when a discretion is reposed in them, this tribunal will take care it shall not be abused. The discretion placed in them in this case, was intended for the benefit of Mrs. *Catlett*, and her children; if she needed the interest, (as it is evident she did,) it ought to have been paid to her; if she needed it not, it ought to have been again put out at interest or invested, that it might have accumulated for the benefit of her children. And as they have thought proper not so to do, it is the duty of the court to pass such a decree as will place the mother and children (so far as it is practicable,) in the same situation they would have been in had the trustees have done their duty.

On calculating the interest from the 25th of November 1818, to the 23d of April 1823, on the \$2000 retained by *Darne*, and adding interest on the \$120, he should have annually paid or invested, from the time the same ought to have been paid or invested, there is due from him interest amounting to \$584 37½; and the interest from *Gassaway*, calculated on the same principle, but commencing on the 25th of November 1817, there is due on account of interest the sum of \$1472 26 2-3. In order, therefore, that the complainant, Mrs. *Catlett*, may in future obtain the benefit of the provision made for her decent support by the will of her father—*Decreed*, that *William*

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Darne, one of the defendants in this cause, on or before the 24th of June next, bring into this court the said sum of \$584 37½, with interest thereon from the 23d of April instant. And that *Charles Gassaway*, the other defendant, bring into this court the said sum of \$1472 26 2-3, on or before the said 24th day of June next, with interest thereon from the same 23d of April. Decreed also, that the said *William Darne*, annually, during the life-time of *Polly Catlett*, commencing on the 23d of April 1824, bring into this court the sum of \$120, the legal interest on the \$2000 retained by him, so long as he retains the said \$2000. And that *Charles Gassaway* also bring into this court annually, commencing on the same 23d of April, the sum of \$240, the legal interest on the \$4000 retained by him, so long as he retains the same. Decreed also, that the said defendants be and they are hereby authorised, in order to free themselves from the annual payment of the interest as above directed, to pay into this court the principal money; the same, when brought in, to be invested and applied, under the direction of the court, pursuant to the will of *Charles Gassaway*, in the proceedings mentioned. And decreed also, that the defendants pay to the complainants their costs, &c.

From this decree the defendants appealed to this court.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, STEPHEN, and AROHER, J.

Taney and *B. Forrest*, for the Appellants, contended, that the decree was erroneous, 1. Because, by the clause of the will, a discretion was vested in the executors, with which the chancellor should not interfere without evidence of an abuse of the discretion, and that there was no such evidence in the record.

2. Because the executors were charged with compound interest.

3. Because proper parties had not been made. That *Deborah Edwards*, *Eliza Dorsey*, and *Evelina Dorsey*, named in the bequest, were interested therein, and should have been parties.

On the first point, they cited *Gower vs. Mainwaring*, 2 Ves. 87, 89, and *Bennett vs. Honeywood*, Ambl. 708, 710.

On the second—*The State of Connecticut vs. Jackson*,

1 *Johns. Chan. Rep.* 13. *Waring vs. Cunliffe*, 1 *Ves. jr.* 99. *Newton vs. Bennett*, 1 *Bro. Chan. Ca.* 135, 362, (and notes by *Eden*,) 375. *Schieffelin vs. Stewart*, 1 *Johns. Chan. Rep.* 620; and *Raphael vs. Boehm*, 11 *Ves.* 92.

On the third—*Mitt. Plead.* 39, 144. *Wiser vs. Blackly*, 1 *Johns. Chan. Rep.* 438; and the act of assembly of 1818, ch. 193, s. 14.

Magruder, for the Appellees, on the second point, cited *Raphael vs. Boehm*, 13 *Ves.* 407, 590; and *Dunscumb vs. Dunscumb*, 1 *Johns. Chan. Rep.* 508.

On the third—*Wendell vs. Van Renselear*, 1 *John. Chan. Rep.* 349. *Wiser vs. Blackly*, *Ibid* 438; and *Brown vs. Ricketts*, 3 *Johns. Chan. Rep.* 553.

ARCHER, J. delivered the opinion of the court. The appellants' counsel have urged three grounds for the reversal of the decree in this case:

1. That by the bill a discretion is vested in the respondents, with which the chancellor should not interfere, without evidence of an abuse of such discretion, and that there is no such evidence in the record.

2. That the chancellor has charged compound interest.

3. That *Deborah Edwards*, *Eliza Dorsey* and *Evelina Dorsey*, should have been made parties.

The first objection cannot be supported. The court are of opinion, that the executors, so far as regards Mrs. Catlett, have been unmindful of the trust reposed in them by the will. One of them has been so entirely inattentive to the wants of the complainant, that he has placed reliance upon the vague information of others, without giving himself the trouble, as it was his duty to have done, to investigate its truth. As a vigilant trustee he was called upon, by the character of his trust, to ascertain, by the proper evidences, which was surely always in his power to obtain, that the contingencies had or had not happened upon which the trusts were to be executed, and he was surely wandering from the path of his duty when he depended upon the casual information derived from such questionable sources. The other respondent formed the determination not to pay her any thing, until she should be reduced to a state of utter destitution by the boundless indiscretion

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of her husband, and has placed a construction on the terms of the bequest entirely inconsistent with the beneficent intentions of the testator. Although the testator has declared expressly, that in this bequest he has *made a provision for his daughter*, her interests are viewed in a secondary light, and the apprehensions of a profligate expenditure, by the husband, of any thing which might be paid, has but too evidently operated as a reason for the indefinite postponement of the execution of the duties of the trust. The testimony in the cause clearly represents her to have been in a situation which the testator anticipated, and they are both *proved* to have *in effect* acknowledged, that her necessities called for their interposition; yet the reception of a threatening letter constitutes the frivolous reason for the non-payment. The chancellor, from the answers and evidence in the cause, has rightly conceived, that the proceeds of this fund should be placed under the control of that court, subject to be applied, as occasion might require, towards the fulfilment of the intentions of the testator, in administering to her wants, and in supplying her with the means of a decent support.

But this court cannot concur with the chancellor in the allowance of compound interest. *It is neither charged, nor proved, that the executors had appropriated any of the bequest, or of the proceeds thereof, to their own use, or employed them in their own business, or in any way made any profit or gain from them, or in any manner subjected them to hazard. Roche vs Hart, 11 Ves. 59. Schieffelin vs Stewart, 1 Johns. Chan. Rep. 624. Nor is there any reason to presume from the testimony, a profit or a gain. Treves vs Townshend, 1 Bro. Chan. Ca. 385. Hilliard's case, 1 Ves. jr. 90. Piety vs Stace, 4 Ves. 620. Roche vs Hart, 11 Ves. 58.* On the contrary, if any inference is to be drawn from the proceedings in the cause, as to their disposition of the funds, it is merely that they have suffered the trust money to lie idle. Indeed, it does not appear to have been the intention of the testator, by directing an investment, that the proceeds should accumulate by a re-investment, but to gratify his object the interest should always have been in such a situation as to be immediately applicable to the object of his bounty, and give her the means of a comfortable subsist-

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ence. The interest was not to be paid at all events annually, but if her exigencies had not been such, in any given year, as to require payment, yet unfortunate occurrences might have happened which would have demanded from them the payment of interest, which might have remained on hand for successive years. It was therefore proper that the interest of this fund should always have been kept within their control and power, for immediate relief, when unforeseen necessities or misfortunes might have demanded its application. This control could not have been so well exercised had the interest, as it accrued, been regularly invested, or put out to interest. It is therefore the opinion of the court, that there is no ground to charge the executors with more than the legal interest.

It is a general rule, that all persons interested in the subject of a suit should be made parties, whether that interest be legal or beneficial. The reason of this principle is, that the court may be enabled to make a complete decree between the parties, may prevent future litigation by rendering a multiplicity of suits unnecessary, and may make it perfectly certain that no injustice shall be done either to the parties before the court, or to others who may be interested in a decree that may be grounded upon a partial view only of the real merits. *Mitford*, 29, 220, 144, *Cooper Eq. Pl.* 185. To this general rule there are many exceptions growing out of cases where, consistently with practical convenience, it would be incapable of application. *West vs. Randall*, 2 *Mason's Rep.* 181, 190, per *Story, J.* To these cases it is entirely unnecessary to advert, because we do not conceive that the case before us comes within the scope of the general rule. The mother applies to the court to compel the application of the interest to relieve her necessities. This application for relief is confined to the terms of the trust, and to that portion of the trust money to which she has an interest. The principal belonging to her children is not sought to be affected. It is true they have an interest in any balance of this fund, applicable to her use, which at her death may remain unexpended. But the power conferred is entirely discretionary in the executors, and they are at liberty to apply the whole of it to the mother, if they deem it proper. Having this unlimited discretion reposed in them, it is believed

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that they could not be held accountable to the children. At all events, the interest is decreed to be paid into court for the purposes of the trust, and their contingent rights to this fund are left entirely *untouched by the decree*. There it will remain, subject to future appropriation, and if they deem its expenditure at any time made at periods and under circumstances not called for by the will, they would doubtlessly have the power to protect any interest they might have by an original application to the chancellor.

EARLE, J. The decree in this case ought in my judgment to be affirmed. I do not consider the interest charged on the annuity, which the necessities of Mrs. *Catlett* required to be paid to her, as compound interest.

STEPHEN, J. concurred in opinion with Judge *Earle*.

DECREED, that the decree of the court of chancery, in that part thereof which ordered and adjudged that the defendants should, on or before the 24th of June then next, bring respectively into that court the sums of money therein mentioned, be reversed. And decreed, that *Darne*, one of the appellants, shall on or before such day as the chancellor shall direct, bring into the court of chancery the sum of \$550, being the amount of the interest due on the sum of \$2000 retained by him, calculated from the 25th of November 1818, to the 23d of April 1823, with interest on the said sum of \$550 from the 23d of April 1823, until the time of bringing the same into the said court; and also that *Gassaway*, the other appellant, on or before, &c. bring into the court of chancery the sum of \$1300, being the amount of the interest due on the sum of \$4000 retained by him, calculated from the 25th of November 1817, to the 23d of April 1823, with interest on the said sum of \$1300, &c. Decreed also, that the residue of the said decree of the court of chancery be affirmed—Each party to pay their respective costs incurred in this court. That the chancellor pass such order and decree as may be proper and necessary to carry into full and complete effect the decree of this court.

DECREE REVERSED, &c.

WALLINGSFORD vs. WALLINGSFORD.

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Courts of equity in this state have jurisdiction in cases of alimony. Alimony is a maintenance for the wife, where the husband refuses to give it, or by his improper conduct forces her to separate from him. It is not a portion of his real estate to be assigned to her in fee, and subjected to be sold by her, but terminates at her death, or at their ceasing to live apart.

Before a decree for alimony can be had, the court must know, either from the admissions of the parties, or from other evidence, that the husband refuses to maintain his wife, or has forced her to leave him; and also the value of his estate.

On a bill for alimony the court cannot decree a sale of any part of the husband's estate.

Whether or not articles of agreement immediately between husband and wife, for her separate maintenance, will be enforced? It is clear, however, that she can make no such agreement by attorney.

On a petition by the wife for alimony, and the husband's appearing, and by his answer stating that he was willing to allow her a maintenance, to let her have \$2000, the property she had before received from her to be valued and estimated by J S M and J H, as a part of it, and the balance of said \$2000 to be taken by her in such of his other property as

APPEAL from *Prince George's* county court, sitting as a court of equity. On the 13th of April 1821, a petition was filed by the appellee, who is the wife of the appellant, stating, that her husband had turned her out of his house, and refused to permit her to live with him, or to make any reasonable provision for her support, and that she was left destitute, and that he was a man of considerable property, the greater part of which he obtained by his marriage with her. It also stated, that he had, some time before, by fear, threats, and fraudulent misrepresentations, prevailed on her to execute some writing, and which was not done fairly or legally so as to be binding on her. Prayer for a *subpoena*, that the defendant might be compelled to answer and to produce said writing, and state under what circumstances and in whose presence it was executed, and also the amount of his property, real and personal, so that a proper and reasonable allowance for her support might be decreed her, and for such further and other relief in the premises as she might be entitled to. The answer to this petition states, that the respondent was willing to allow the petitioner a reasonable proportion of property for a maintenance; that he was willing to allow her \$2000; the property she had received from him to be valued and estimated by *John S. Magruder* and *John Hodges* of *Thos.* as a part of it; the balance of the \$2000 to be taken by her in such of his property as she might choose, at a valuation by said *Magruder* and *Hodges*, and the balance in money, or notes made payable to said *M* and *H*, at such periods as they should determine to be reasonable, and to be held and applied by them to her separate use. At the foot of the answer an agreement was signed by the solicitor for the complainant, and by the defendant, that the court should pass a decree agreeably to the proposition in the answer, and that said provision shall be in lieu of all claim of dower of the petitioner to any of her husband's property. The court passed an order that the said *M* and *H* proceed to value the property in the proceedings mentioned, and in their report ascertain and disclose what property the complain-

she might choose at a valuation by said *J S M* and *J H*, and the balance in money, on notes made payable to said *J S M* and *J H*, at such periods as they should determine to be reasonable, and to be held and applied by them to her separate use, accompanied with a written agreement, signed by the husband and by the wife's attorney, that the court should decree according to the proposal in the husband's answer. Held—1. That no decree could pass to enforce such an agreement. 2. That in case, that a decree could not be had for a sale of any part of the husband's estate. 3. That if either *J S M* or *J H* declined to make the valuation proposed by the answer, the court had no authority to substitute, without the husband's consent, any other person to make such valuation, and 4. That it was not a case proper for a decree for alimony.

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ant received previous to the valuation; what property she may obtain at the time of valuation, or at any subsequent period; the valuation and report to be subject to the further order of the court. The petitioner sometime after this order suggested the refusal of *Hodges* to act, and prayed that *Otho B. Beall* might be appointed, and the court, without the consent of the defendant, appointed *Beall*. *Magruder* and *Beall* made their report, in which they stated, that the petitioner had received of the respondent's property \$430; that at the time they went to make the valuation the defendant was in the act of taking away from the petitioner the property so received by her, which they prevented. They were proceeding to value other property, such as she might choose, when the respondent refused to let her have such other property as she requested, but offered to give her sixty acres of land if she would give him a receipt in full for her claim, which she refused to do. Further, that it had been represented there were two notes in the hands of some person for the use of the petitioner, which the defendant declared he would not pay. Sometime afterwards the petitioner suggested to the court, that *Magruder* refused to proceed further to execute the order, and the court, on motion of the complainant, appointed the said *Beall* and *H. D. Chapin*, to proceed in the execution of the order. They reported that there was due to the petitioner, after making deductions, \$1381 25, and that they valued the land of the respondent, chosen by the petitioner, at \$12 per acre, and set off as her share 115 acres ten perches, which they described by metes and bounds. On this report the court passed another order, that the same would be ratified unless cause was shown to the contrary by the defendant; provided a copy of the order was served on him. At the time appointed for acting upon the return, the defendant filed a petition, in which he sets forth that he had been induced to give a written consent for a division of his property for the maintenance of his wife, and charges that his wife left his bed and board without any just cause or provocation, and that he was perfectly willing that she should return and live with him if she chose to do so. He prayed that all proceedings in the case might be quashed. A motion was then made by the defendant, that the complainant show cause why the proceedings should not be quashed; but the court

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refused, and overruled the motion, and ordered that the same be stricken out of the minutes of proceedings in the cause, and they ratified the report. A petition was afterwards filed by the complainant, in which she referred to the former proceedings, and stated that she was desirous to effect a sale of the land which had fallen to her share, &c. and that not being competent to make a deed of the same, she prayed that the court would appoint some fit and suitable person or persons to effect said sale, and to give a title to the purchaser. On this petition the court ordered, that *H. D. Chapin* be appointed trustee to effect the sale. The defendant appealed to this court.

The cause was argued before MARTIN, ARCHER, and DORSEY, J.

Magruder and *Ashton*, for the Appellant, contended, that the petition was to be considered as a bill brought simply for *alimony*. The answer of the defendant admits none of the facts stated in the petition, but contains a proposition which is afterwards made a contract between the parties, and is the only foundation for the subsequent proceedings in the case. They insisted on a reversal of the decree, 1. Because it is not according to the contract, but in manifest violation of it. It is a decree *for the sale* of property, which by the contract was to be held and applied by them, (*M.* and *H.*) to the sole and separate use of the petitioner.

2. Because the property decreed to be sold was not set apart by the persons named by the parties to value it, and the agreement gave to the court no authority to substitute other persons.

3. Because the property which is to be applied to the sole and separate use of the petitioner, is to be in lieu of all claim of her dower to any of her husband's estate; whereas the decree of the court, which takes from the husband this property, does not deprive the wife of such claim in case she should survive him. If the court could not by its decree deprive her of dower, then it could not enforce the contract, and ought not to have decreed against the defendant.

4. Because, although a court of chancery may in some cases decree a separate maintenance to the wife, yet this cannot be done if the husband offers to receive the wife again; and in this case the defendant did make such offer.

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5. Because the case furnished no ground for relief in chancery, and especially gave to the court no authority to direct a sale of the land.

On the *first, second and third points*, they cited 1 *Blk. Com.* 441. 3 *Blk. Com.* 94. *Ball vs. Montgomery*, 2 *Ves. jr.* 195. Act of assembly February 1777, *ch. 12, s. 14.* 1 *Madd. Chan.* 308; and *St. John vs. St. John*, 11 *Ves.* 533.

On the *fourth*—1 *Madd. Chan.* 507. *Legard vs. Johnson*, 3 *Ves.* 351, 361, and the cases referred to in note (1) in 558. *St. John vs. St. John*, 11 *Ves.* 532. *Wilks vs. Wilks*, 2 *Dick.* 791. *Head vs. Head*, 3 *Atk.* 295, 296, 547, 550. 1 *Ves.* 17, S. C. *Whorewood vs. Whorewood*, 1 *Chan. Ca.* 250. *Bullock vs. Menzies*, 4 *Ves.* 798; and *Purcell vs. Purcell*, 4 *Hen. & Munf.* 507.

On the *fifth*—*Duncan vs. Duncan*, *Cooper's Rep.* 254. *Ball vs. Montgomery*, 2 *Ves. jr.* 195. 1 *Blk. Com.* 441. 3 *Blk. Com.* 94. *Wilks vs. Wilks*, 1 *Dick.* 791. *Worrall vs. Jacob*, 3 *Mer.* 268. *Fletcher vs. Fletcher*, 2 *Cox's Rep.* 100; and *Durand vs. Durand*, *Ib.* 207.

F. S. Key, for the Appellee, referred to the act of February 1777, *ch. 12, s. 14.* 1 *Fonbl.* 105, (note n.) *Galwith vs. Galwith*, 4 *Harr. & M. Hen.* 477; and *Monell vs. Lawrence*, 12 *Johns. Rep.* 521.

MARTIN, J. delivered the opinion of the court. The proceedings in this case are erroneous, and must be reversed. It is an application for alimony, and there can be no doubt, the courts of equity in this state have jurisdiction in such cases, and will decree relief, where a proper foundation is laid for it. Their authority depends not merely on the constructive powers given to our courts of chancery, but is expressly delegated by the act of 1777, *ch. 12.*

Alimony is a maintenance afforded to the wife, where the husband refuses to give it, or where from his improper conduct compels her to separate from him. It is not a portion of his real estate, to be assigned to her in fee simple, subject to her control, or to be sold at her pleasure, but a provision for her support, to continue during their joint lives, or so long as they live separate. Upon the death of either, or upon their mutual consent to live together, it ceases, and the amount of this allowance must de-

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pend upon the value of the husband's estate. Before a decree can be passed for alimony, the court should be in possession, either by the admission of the parties, or by testimony, of all the facts necessary to form a just decision. It must be proved that the separation was not by the voluntary act of the wife, but from the misconduct of the husband; and unless testimony is offered (in the absence of admissions by the party,) to show the value of his property, what data is given to ascertain the amount of her allowance? The decree in this case does not assign an income for the maintenance of the wife, but directs a sale of part of the real estate of the husband, and no disposition is made of the proceeds of such sale.

If then this decree is founded on the petition for alimony, independent of any agreement between the parties, it cannot be sustained. The record does not present any admission or evidence to ascertain the value of the husband's property. The decree does not direct an income to be paid for the maintenance of the wife. It does not create a personal liability in the husband to pay any sum of money, but orders in the first instance his land to be sold.

Let us see if this decree is entitled to more respect, if the agreement was the foundation for it?

By the agreement the husband was to give the wife, or to trustees for her use, property to the value of \$2000. This property was to be selected by her, and was to be valued by two persons named in the agreement, *John S. Magruder* and *John Hodges*, of *Thos.* and in consideration of this property, the wife was to relinquish all her right of dower in her husband's estate. This agreement was signed by the husband, but not by the wife; *it was signed by an attorney.*

Whether an agreement for a separate maintenance will be enforced, where such agreement rests in articles between the husband and wife, appears not to be settled; those agreements are generally carried into effect by the intervention of a third party. In one case it was determined, such articles may be enforced at the suit of the wife. *Fitzer vs Fitzer*, 2 *Atk.* 511. But it is said, this decision was disapproved by subsequent chancellors; and *Legard vs Johnson*, 3 *Ves.* 361, *St. John vs St. John*, 11 *Ves.* 532, and *Wilks vs. Wilks*, 2 *Dick.* 791, are referred to as evidence of it. The wife, however, is not bound by a

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deed of separation, and a specific performance cannot be enforced as against her. *St. John vs St. John*, 11 *Ves.* 533. It is not necessary to decide this question in the case before us, nor do we mean to express an opinion upon it. For whatever effect might be produced by an agreement signed by the husband and wife, it is very clear, she could make no agreement *by her attorney*.

But suppose this to be a valid contract between the parties, has the court decreed a specific performance of it? The agreement was, that the property to be selected by the wife was to be valued by *Magruder* and *Hodges*; they are named in it for that purpose; that it should be valued *by them*, was a condition on which the husband agreed to give up his property, and formed an essential part of the contract. The court had no authority to substitute others in their place, in the manner stated in the proceedings. What is the case before us? The land was not valued by *Magruder* and *Hodges*, but by other persons, substituted by the court for them, without the consent, and perhaps without the knowledge of the husband, at least the appointment of one of them. The court have made a *new* contract for the parties, and have decreed a specific performance, not of an agreement made by them, but of one made by the court for them, without the assent of one of the contracting parties.

But again—If this was a binding contract on the parties; and the valuation had been made by *Magruder* and *Hodges*, how could the court decree a specific performance of it in the case then before them? That was a petition for alimony, and on that petition alimony alone could be decreed. If a special agreement was made between the parties, and accepted by the wife in lieu of her alimony; that agreement *per se*, superseded all proceedings in the case then depending; she had accepted another remedy; and if the husband did not perform his agreement, a new bill ought to have been filed against him, to enforce a specific performance of it. Here the petition was filed for alimony on the 30th of April 1821. The court lose sight of the facts and prayer stated in the petition, and decree the specific performance of an agreement made on the 14th of September following, *more than four months after the case had been depending before them*.

The decree is reversed, without prejudice to the rights of the parties.

DECREE REVERSED, &c.

BROWN vs. CAMPSALL.

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APPEAL from *Baltimore* county court. Replevin for a horse. The defendant, (now appellee,) pleaded property; and at the trial, the plaintiff, (the appellant,) offered evidence to prove, that the horse mentioned in the declaration was once his property, and that before the institution of the present suit, he exchanged him with one *Wilson* for a horse which *Wilson* had previously stolen from one *Richard Norris*, and that *Wilson* represented to the plaintiff, at the time of the exchange, that the horse which he gave in exchange to the plaintiff was the horse of *Wilson*; that *Norris*, after the exchange, found his horse, so exchanged, in the possession of the plaintiff, who delivered him to *Norris*. The defendant then proved, that *Wilson*, after the said exchange, brought the horse which he had so as aforesaid received from the plaintiff, to the city of *Baltimore*, and sold him at public auction to the defendant, for a valuable consideration, and without any notice on the part of the defendant, of the manner in which he, the said *Wilson*, had acquired the horse, and that the sale at auction was made previous to the issuing of the replevin in this cause. The defendant then prayed the court to direct the jury, that if they believed the above facts, the plaintiff was not entitled to recover; which opinion and direction the court, [DORSEY Ch. J.] gave. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

W exchanged a horse, which he had before stolen, with *B*, for a horse of *B*'s, and afterwards sold *B*'s horse to *C*, for a valuable consideration, & without notice on the part of *C* of the manner in which *W* had obtained him. In an action of replevin by *B* against *C*, for this last horse—*Held*, that *B* was not entitled to recover.

The cause was argued before BUCHANAN, Ch. J. EARLE, MARTIN, STEPHEN, and ARCHER, J.

R. Johnson, for the Appellant, contended, 1. That the sale of the horse to the appellee was inoperative and invalid as against the appellant. 2. That at the time of the sale the appellant did not lose his property in the horse. 3. The contract being wholly void, the property in the horse continued in the appellant.

To show that the *English* law as to sales in market overt is not in force in this country, he referred to *Browning vs. Magill*, in this court, (June 1808,) and *Wheelwright vs. Depeyster*, 1 Johns. Rep. 471. He also contended, that *Wilson* might have been prosecuted for felony for taking the horse in dispute. He cited 3 Bac. Ab. tit. *Felony*, (C.)

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132. That sale was wholly void on account of the fraud. 1 *Com. Cont.* 37; and *Hodgson vs. Richardson*, 1 *W. Blk. Rep.* 465, per *Yates, J.*

Moale, for the Appellee. As between the original parties to the contract, if it was fraudulent, there would be no question as to its being void. But that is not this case. Here the appellant parted with his property voluntarily. Until fraud was proved, *Wilson* had complete property in the horse. This is not the case of a horse stolen from the appellant, which would not divest the property, but it is a sale with his consent. The appellee had no notice of the fraud, and is a *bona fide* purchaser for a valuable consideration. He cited and relied on *Parker vs. Patrick*, 5 *T. R.* 175. *Doe vs. Martyr*, 4 *Bos. & Pull.* 332. *Jackson vs. Henry*, 10 *Johns. Rep.* 185; and *Fletcher vs. Peck*, 6 *Cranch*, 133.

JUDGMENT AFFIRMED.

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MASS vs ROGERS.

M was duly bound an apprentice to *J M*, and others, in the city of *Baltimore*. He afterwards applied to the court of Oyer and Terminer, &c for *Baltimore* county, with the consent of *J M*, and others, to be released from his indentures, where he was released; and with his own consent, and the consent of *J R*, that court pass this order—"It is adjudged and ordered, that *M*, be and he is hereby bound to *J R*, until he is 21 years of age, to learn the trade of," &c. In an action of covenant by *M* against *J R*, for a breach of this order—*Held*, that *M* was not entitled to recover

APPEAL from *Baltimore* county court. This was an action of covenant, on an indenture of apprenticeship entered into by the defendant below, (now appellee,) the then master, in favour of the plaintiff, (the appellant,) as an apprentice. The declaration states, "that whereas by a certain indenture made on the *thirteenth* day of July, eighteen hundred and ten, at the county aforesaid, between the said *Mass*, by the name of *Thomas Jackson Mass*, by his mother, *Ann Mass*, of the one part, and *James Mosher*, *Robert Carey Long* and *William Gwynn*, of the other part, the counterpart of the said indenture sealed with the seals of the said *James*, *William* and *Robert*, the said *Mass* brings here into court, the date whereof is the day and year aforesaid, it was witnessed, that the said *Mass*, at his own free and voluntary will, and with the consent of his mother, placed and bound himself apprentice to the said *James*, *Robert* and *William*, to learn the art and mystery of spinning wool, and weaving and dressing woollen cloth, as by the said indenture, relation being thereto had, will more fully appear; and the said *Mass* further saith, that in virtue of a judgment and order of the court of oyer and

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terminer and gaol delivery for *Baltimore* county, duly made and passed at the January term of the said court, in the year eighteen hundred and fifteen, as by the records of said court, reference being thereto had, will more fully appear, the said *Mass* was, according to the act of assembly in such case made and provided, released from his said indenture with the consent of the said *James, Robert* and *William*, and by the said court the said *Mass*, who would be fifteen years of age on the thirteenth day of April, eighteen hundred and fifteen, was bound to the said *Rogers*, by and with the consent of the said *Rogers*, until the said *Mass* should attain the age of twenty-one years, to learn the trade of a saddler and harness maker, the said *Rogers* to teach him, the said *Mass*, the said trade, and to find him in sufficient meat, drink, apparel and necessaries suitable for an apprentice, and twelve months night schooling. And the said *Mass* in fact saith, that the said *Rogers*, in pursuance of the judgment and order aforesaid, and of his consent aforesaid, to the conditions and terms aforesaid, did receive the said *Mass* into his service as such apprentice, on the terms and conditions in the said judgment and order aforesaid; and the said *Mass* avers, that by virtue of the said judgment and order aforesaid, and the consent of the said *Rogers*, he did enter and was received by the said *Rogers* into his service as such his apprentice, in form aforesaid, and into the house of the said *Rogers*, and did stay and continue in the service of the said *Rogers* until he attained to the age of twenty-one years, to wit, until the fourteenth day of April, eighteen hundred and twenty-one. And the said *Mass* further saith, that although he, the said *Mass*, always from the time of rendering the judgment and order as aforesaid, until the fourteenth day of April, eighteen hundred and twenty-one, as aforesaid, well and faithfully did, performed and fulfilled, every thing in the said judgment and order contained, on his part and behalf to be performed and fulfilled, yet that the said *Rogers*, during all or any part of the said term of service of the said *Mass* as aforementioned, did not teach or instruct, or cause to be well and sufficiently taught and instructed, the said *Mass* in the said trade of a saddler and harness maker, after the best way and manner that he could, according to the form and effect of the said judgment and order as aforesaid, but therein wholly failed and made default;

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contrary to the provisions, conditions, and effect of the said judgment and order as aforesaid, and of the covenant of the said *Rogers* so made in that behalf as aforesaid. And the said *Mass* further saith, that the said *Rogers* did not, during the said term of service of the said *Mass* as aforementioned, find him the said *Mass* twelve months night schooling, but refused so to do, contrary to the provisions, conditions and effects of the said judgment and order as aforesaid, and his said covenant so made in that behalf as aforesaid; and so the said *Mass* saith that the said *Rogers* (although often thereto requested) hath not kept with the said *Mass* his covenants in manner aforesaid made, but hath broken the same, and to keep the same with the said *Mass* hath hitherto wholly refused, to the damage of the said *Mass*, in the sum of five hundred dollars current money, and therefore he brings his suit," &c.

The judgment and order of the court of oyer and terminer of *Baltimore* county, mentioned and referred to in the declaration, was exhibited, and it states that at a court of oyer and terminer, &c. for *Baltimore* county, in January 1815, the following petition was presented to that court, "To the honourable the justices of the court of oyer and terminer and gaol delivery for *Baltimore* county. The petition of *Thomas Jackson Mass*, by *Ann Mass*, his mother and next friend, humbly sheweth, that your petitioner was heretofore, on the thirtieth day of July 1810, bound apprentice to *James Mosher*, *Robert Carey Long* and *William Gwynn*, to learn the art and mystery of spinning wool and weaving and dressing woollen cloth, as by a copy of his indenture will appear. Your petitioner states, that the said *Mosher*, *Long* and *Gwynn*, have declined carrying on the said trade, or mystery; and your petitioner, from experience, finds the said trade unsuited to his genius and injurious to his health; he therefore prays that he may be released from the said indentures, and bound to another person to learn a different and more suitable trade, and he will pray.

Thomas J. Mass, by *Ann Mass*."

Mosher, *Long* and *Gwynn*, by a writing under their hands and seals, consented to release, and did release *Mass* from all claims as their apprentice; and the following instrument of writing was then exhibited to the court: "I agree and consent that *Thomas Jackson Mass*, who with

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he fifteen years of age on the thirteenth day of April next, shall be bound to me until he attains to the age of twenty-one years, to learn the trade of a saddler and harness maker, and I bind myself to teach him the said trade, and to find him in sufficient meat, drink, apparel and necessities, suitable for an apprentice, and twelve months night schooling.

John Rogers."

Whereupon it was ordered and adjudged by the court, that the said *Thomas Jackson Mass* be. and he is hereby discharged from his indentures to the aforesaid *James Mosher, Robert C. Long* and *William Gwynn*. It is also further ordered and adjudged by the court, that the said *Thomas Jackson Mass*, be and he is hereby bound to *John Rogers* until he attains to the age of twenty-one years, to learn the trade of a saddler and harness maker, and the said *John Rogers* to teach him the said trade, and to find him in sufficient meat, drink, apparel and necessities, suitable for an apprentice, and twelve months night schooling, &c.

The defendant craved oyer of the indenture, and it was exhibited in the following words: "This indenture witnesseth, that *Jacob Mass* hath bound his son *Thomas Jackson Mass*, aged ten years the thirtieth day of April last past, as apprentice to *James Mosher, Robert Carey Long* and *William Gwynn*, to learn the art or trade of spinning, weaving and dressing woollen cloth, and to serve the said *James Mosher, Robert Carey Long* and *William Gwynn*, and the survivors and survivor of them, until the said *Thomas Jackson* shall attain to the age of twenty-one years; and the said *Jacob Mass* and *Thomas Jackson Mass* do severally promise and agree to and with the said *James Mosher, Robert Carey Long* and *William Gwynn*, that he, the said *Thomas Jackson Mass*, shall during the said term of his apprenticeship, faithfully and obediently serve his said masters in all things, doing his duty as a faithful apprentice. And the said *James Mosher, Robert Carey Long* and *William Gwynn*, do promise, covenant and agree, to and with the said *Jacob Mass* and *Thomas Jackson Mass*, that they will use their best endeavours, during the time the said *Thomas Jackson Mass* shall continue in their service, to teach him, or cause him to be taught, the said art or trade of spinning, weaving and dressing wool and woollen cloth, and to read and write, and also that they will provide and furnish for him, meat, drink, clothing and other necessa-

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ries suitable for an apprentice, and at the expiration of his apprenticeship customary freedom dues. In witness whereof the parties have hereto set their hands and seals this thirtieth day of July, eighteen hundred and ten." Signed and sealed by *Jacob* and *Thomas J. Mass*, and by *Mosher, Long*, and *Gwynn*, in the presence of, and acknowledged before, a justice of the peace for *Baltimore* county.

The defendant then demurred generally to the declaration, which demurrer the county court ruled good; and the plaintiff appealed to this court.

The case was argued before *BUCHANAN*, Ch. J. *EARLE*, *STEPHEN*, and *DORSEY*, J.

Mitchell, for the Appellant, to show that the proceedings of the court of oyer and terminer were legally obligatory on the defendant—that that court had jurisdiction of the subject matter, and that their proceedings were in due form, referred to the acts of 1799, *ch. 58, s. 9, 12*; 1793, *ch. 45, s. 7*, and *ch. 57, s. 17*. *Allen vs. Dundas*, 3 *T. R.* 125. *Morrell vs. Dickey*, 1 *Johns. Chan. Rep.* 156; and 1 *Chitty's Plead.* 405. And to show that an action of covenant could be maintained in this case, he cited 1 *Chitty's Plead.* 111, 112, 113. 3 *Com. Dig.* tit. *Debt*, (B.) 367. *Ibid* tit. *Covenant*, (A 1,) 256. *Co. Litt.* 231. a. *Bret vs. Cumberland*, *Cro. Jac.* 399, 521; and *Ascue vs. Hollingsworth*, *Cro. Eliz.* 355, 494, 544.

Glenn, for the Appellee, contended, 1. That an action of covenant could not be sustained on a record. He cited 1 *Chitty's Plead.* 109, 113, 114; and *Hollingsworth vs. Ascue*, *Cro. Eliz.* 355. That if the action could be maintained, the court, in which the record was made, must have jurisdiction of the subject; and that here the court of oyer and terminer had no jurisdiction, and being a court of limited jurisdiction, the special jurisdiction must appear on the face of the record. He cited *Bristow vs. Wright*, 2 *Doug.* 667, 668. *Shrivers vs. Wilson*, 5 *Harr. & Johns.* 130. *The King vs. Gately*, 2 *Salk.* 471. pl. 4. 5 *Mod.* 139, *S. C.* 3 *Vin. Ab.* 26. 4 *Bac. Ab.* 557, 577. *Acts of Assembly* 1793, *ch. 45, s. 2, 4, 6, 7*; 1791, *ch. 21, s. 2*; 1794, *ch. 47*, and 1799, *ch. 44, s. 3*. He insisted also upon the variance between the indenture declared upon, and that of which oyer was given.

JUDGMENT AFFIRMED.

MANDEVILLE vs. JARRETT, Garn. of GRIFFITH.

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APPEAL from *Harford* county court. The affidavit on which the attachment in this case was issued under the act of 1795, *ch. 56*, stated, that the plaintiff, (now appellant,) a citizen of this state, made oath, &c. that *Camillus Griffith*, not a citizen of this state, and not residing therein, was *bona fide* indebted to him, &c. The attachment being laid in the hands of *Jarrett*, (the appellee,) as garnishee, he appeared and pleaded *non assumpsit* by *Griffith*, and *Nulla Bona*. At the trial, the plaintiff read in evidence the papers filed in the cause, and proved that *Camillus Griffith* had acknowledged that he owed to the plaintiff the amount stated in the attachment. He also read in evidence the docket entries of a judgment rendered in *Harford* county court in March 1812, in favour of *Camillus Griffith* against *Jarrett*, (the appellee,) for \$860, with interest from the 3d of February 1810, and costs, and that an *injunction* from the court of chancery had been filed therein on the 24th of February 1814. He also read in evidence the interrogatories exhibited by the plaintiff to the garnishee, and the garnishee's answers thereto, stating that he owed no money to *Griffith*, and had no property of his in his hands; that *Griffith* claimed a balance due from him for land sold him in *Kentucky*, in which sale *Griffith* practised a fraud on him by selling him land to which he had no title; and that for the purpose of obtaining justice of *Griffith*, he had filed a bill in the court of chancery for redress, which suit was then depending. To that bill he referred for his reasons for not owing *Griffith* any money. The plaintiff also read in evidence a letter from *Jarrett* to *Griffith*, dated the 2d of February 1819, stating that he had obtained an injunction, &c. That he was entitled to a deduction from the judgment of \$680, which would leave a balance due *Griffith* of only \$284 44, interest included. He proposed, by way of compromise, to deliver to *Griffith's* agent in *Baltimore*, by the 15th of June, following, 150 barrels of No. 1 Herrings, equal in value to \$600; the suits to be struck off, and each party to pay their own costs in chancery, &c. The defendant then moved the court to direct the jury, that the plaintiff was not entitled to recover. Which direction the court, [*Dorsey*, Ch. J. and *Hanson*, A. J.] gave. The

An affidavit for an attachment under the act of 1795, *ch. 56*, must state that the plaintiff is a citizen of this state, or of some other of the United States, and on the plea of non assumpsit, the fact of such citizenship must be proved.

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plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The case was argued before BUCHANAN, Ch. J. MARTIN, STEPHEN, and ARCHER, J.

Speed, for the Appellant, contended, 1. That an attachment might be laid to attach a debt in litigation. He referred to *Serg. Law of Attach.* 69, 70, 72. 5 *Jacob's L. D.* 490; and *Bull. N. P.* 53.

2. That judgment of condemnation should at least have been rendered for the amount confessed in the appellee's letter to be due to *Griffith*, (viz. \$284 44,) and not contested in the injunction bill.

Magruder and *R. Johnson*, for the Appellee, stated, that although it was set out in the plaintiff's affidavit that he was a citizen of this state at the time of issuing the attachment, that fact should have been proved at the trial under the plea of *non assumpsit*. They cited *Shivers vs. Wilson*, 5 *Harr. and Johns.* 130.

BUCHANAN, Ch. J. The court affirm the judgment on the authority of *Shivers vs. Wilson*, there being no proof in the record that the plaintiff was a citizen of this state, or of any of the *United States*. JUDGMENT AFFIRMED.

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RATCLIFF vs. DANIEL.

D, on the 1st of January 1819, rented a parcel of land to M for one year, and so from year to year, at an annual rent of \$160, to be paid half yearly. It was proved that R occupied the premises in the years 1819, 1820 and 1821, and that he so occupied the premises in 1821, under a contract with D, for the same rent, and on the same terms. In September 1820, D claiming \$240 for rent in arrear on the 1st of July 1820, distrained the property of R. It was also proved that R paid \$88 to D on the 18th of May 1821, and \$50 on the 18th of August 1821, that R made no application of the first payment, but applied the last payment to his own debt, and then said he owed a part of the rents—*Held*, that the property of R, found on the premises at the time of the distress, was liable for the rent of 1819; and that the payment made on the 18th of May 1821, must be applied to the rents becoming due after the distress in September 1820.

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tered into the premises, and occupied the same for one year and a half, ending on the 1st of July 1820; and because the sum of \$240 of the rent was in arrear and unpaid, the defendant avows the taking of the goods, &c. The plaintiff pleaded that no rent was in arrear, &c.

At the trial the defendant proved by *Joseph Turner*, a competent witness, that he, as agent for the defendant, contracted with a certain *William Murdock* for the rent of *The Mill Lot* belonging to the defendant, for the year 1819, he agreeing to pay therefor the sum of \$160, one half on the 1st of July, and the balance on the 1st of January following, and so from year to year so long as they should please. It was also proved that the plaintiff occupied the premises in the years 1819, 1820 and 1821. The plaintiff then prayed the court to instruct the jury, that the plaintiff's property found on the premises at the time of the distress was not liable for the rent of 1819. Which opinion and instruction the court, [*Stephen*, Ch. J. and *Plater A. J.*] refused to give; but were of opinion, and instructed the jury, that it was liable. The plaintiff also proved payment to the defendant of \$88 on the 18th of May 1821, and \$50 on the 18th of August 1821. It was also proved, that when the payments were made by the plaintiff, he made no application of the payment in May 1821, but applied the payment of August 1821 to his own debt, and further said, that he owed a part of the rents. It was also proved that the plaintiff contracted for *The Mill Lot*, and occupied it at the same rent, and on the same terms in 1821. The defendant then prayed the court to instruct the jury, that the payment made on the 18th of May 1821, must be applied by them to the rents becoming due after the distress which was made in September 1820. Which instruction the court gave. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The case was submitted without argument, to the court, [*BUCHANAN*, Ch. J. *EARLE*, *MARTIN*, *STEPHEN*, *ARCHER*, and *DORSEY*, J.] by

Stonestreet, for the Appellant, and

Stone, for the Appellee.

JUDGMENT AFFIRMED.

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LAMMOT'S Heirs & Devisees vs BOWLY'S Heirs.

APPEAL from a decree of *Baltimore* county court, sitting as a court of equity, dismissing the bill of the complainants, (now appellants.) The bill stated that *William Lux*, deceased, being possessed in his own right, in fee simple, among other property, of a tract of land called *Chatsworth*, by his will, dated the 5th of May 1773, did, among other things, devise as follow: "I give and bequeath to my dear wife, *Agnes Lux*, for and during her natural life, my tract of land and plantation, called *Chatsworth*, with the dwelling house, and all the buildings and improvements thereon, (save and except the rope-walk.") "I give and bequeath to my dear son, *George Lux*, his heirs and assigns, my tract of land called *Chatsworth*, lying and being in *Baltimore* county, containing nine hundred and fifty acres; but in case my said son should die before he attains of legal age, and without issue, then I leave and bequeath the said tract of land, called *Chatsworth*, to my dear wife, *Agnes Lux*, or her assigns, to be at her own will and disposal, as it originally was, (save and except five acres, to be laid off in a long square, on the south two degrees west one hundred and thirty-one perches line, being the fifth line from the beginning; and that said five acres, together with the rope-walk, and all the buildings and improvements thereon, I give and bequeath to my dear nephew and partner, *Daniel Bowly*, his heirs and assigns.") "And all the rest and residue of the said tract called *Chatsworth*, I give and bequeath to my said nephew, *Daniel Bowly*, and his heirs and assigns." "Item, I leave and bequeath my dear son, *George Lux*, residuary legatee of my last will and testament." "Lastly, I hereby nominate, constitute and appoint, my nephew, *Daniel Bowly*, executor of this my last will and testament, desiring him to see the same faithfully executed." That *George Lux*, after the death of his father, entered into and was possessed of the said tract of land, and being in quiet and undisputed and undivided possession, and also having attained the age of twenty-one, did, by deed dated the 17th of April 1787,

A party contracting under a clear and unambiguous mistake of his legal rights, where such rights are of a doubtful character, will be relieved in equity.

L., by his will, devised to *A. L.*, his wife, "for and during her natural life, my tract of land called *Chatsworth*, with the dwelling house, and all the buildings and improvements thereon, (save & except the rope-walk.) And I give to my son *G. L.*, his heirs, &c. my tract of land called *Chatsworth*, &c. but in case my said son should die before he attains of legal age, and without issue, then I bequeath the said land to my said wife, and her assigns, to be at her own will and disposal, as it originally was, (save and except five acres to be laid off in a long square, &c. and that said five acres, together with the rope walk and all the buildings, &c. I give to my nephew and partner, *D. B.*, his heirs.") &c. *D. B.*, the nephew, believed that he had no title to the five acres, unless *C. L.*, the testator's son, died within age and without issue, and on his having issue, supposed the son to have a clear title to the five acres. Under that impression, he was privy to a sale of that part of *Chatsworth* by *G. L.*, to *D. L.*, for a fair and valuable consideration, and permitted *D. L.* to take possession of it, and to enjoy it for many years unmolested.

Afterwards, being advised that the effect of the devise was to give him these five acres, independent of the contingency of *G. L.*'s coming of age, or dying without issue, he instituted an ejectment for them, and recovered. On a bill in equity filed by *D. L.* the purchaser, to stay proceedings on the judgment at law—Held, that the relief could not be granted, that *D. B.* was not to be affected by his knowledge of the sale of the property, and his long acquiescence under it, as in so doing he acted under a clear mistake of his own title.

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convey, among other property, the residue of the said tract of land, called *Chatsworth*, so devised to him, (and which had not been previously conveyed by him,) to *William Russell*, in fee simple, in trust for the several uses, intents and purposes, therein declared, and among others, to sell and dispose of such parts of the same as the said *Russell* might think proper, to enable him to pay the debts due by the said *George*, &c. That *William Russell*, and *William Lux*, in the life-time of *William Lux*, with whose sister *Russell* had intermarried, were indebted to *Harry Dorsey Gough*, on a bond, dated the 12th of December 1769, for £100 sterling; that *William Lux* and *Daniel Bowly*, (the said *Bowly* being a nephew of *William Lux*,) were indebted also to *Gough* on a bond, dated the 11th of August 1768, for £500; that the principal sums of these debts, as likewise a large amount of interest, remained due until the 20th of July 1787. That *William Russell*, in pursuance of the deed of trust to him from *George Lux*, and to discharge in part the said debts due by *William Lux*, in his life-time, jointly as aforesaid, and which the said *George* was bound to pay, as heir and devisee of *William Lux*, did sell the lands hereinafter described, being part of the said tract called *Chatsworth*, to *Daniel Lammot*, (the ancestor of the complainants,) who had applied to *Gough* to allow him a credit on the debts due to *Gough* from *Russell*, *Lux* and *Bowly*; but it was agreed between the parties, that the said land should be conveyed to *Gough*, in order to make the same responsible to him for the credit so given. That in conformity with the said agreement and understanding, *Russell* did, by a deed duly executed, acknowledged and recorded, according to law, bearing date the 27th of April 1789, convey, in fee simple, to *Gough*, the said land, being part of said tract called *Chatsworth*, and part of the property conveyed to *Russell* by *Lux*, and which is contained within the following description, that is to say, &c. containing and sold for 16 acres and a quarter of an acre, together with all rights, privileges and advantages, unto the same belonging; that *Gough* never had actual possession of the said land; he took the said *Lammot's* penal bond for the credit granted as aforesaid, and passed to *Lammot* his bond, to convey the said land when the debts of *Lux*, *Bowly* and *Russell*, should be discharged, which were guaranteed by the said

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land. The bill charges, that *Daniel Bowly* was privy to, and perfectly acquainted with, and fully assented to the transactions aforesaid, being in reality a party thereto—that the said land above described was in fact sold to *Lammot* by *Russell*, in two parcels, both of which were included in one conveyance to *Gough*, as aforesaid, and *Gough* made a settlement or an adjustment of his claim on *Lux* and *Bowly*, with *Bowly*, whereby on the 20th of July 1787, he credited them with the sum of £523 15, *Maryland* currency, for land (being part of the land herein before particularly described,) sold by *William Russell*; and on the 2d of April 1789, *Gough* credited the account of *Lux* and *Bowly*, with £70, *Maryland* currency, for two acres more, (being the residue of the said described land,) and that *Gough* did charge *Lammot* with the said two sums of money which he had before credited *Lux* and *Bowly* with, as aforesaid, so that the said purchase money, which *Lammot* agreed to pay to *Gough*, for the said land, and which he did subsequently pay in full with interest, was applied to extinguish the like amount of what was due by *Lux* and *Bowly*, and the latter was thereby released and discharged from the further payment of that amount. Of all which facts and circumstances *Bowly* had the most intimate and exact knowledge, deriving by the transactions aforesaid, very valuable and important advantages. That *Daniel Lammot*, at the time, or shortly after, his purchase from *Russell* of the said described land, (the conveyance of which was made to *Gough*, as aforesaid,) did enter into actual possession of the said land, and so continued in quiet and undisturbed, and undisputed possession for many years, that is to say, until or about the year 1804, (except so far as *Lammot* had disposed of certain parts thereof to *bona fide* purchasers and lessees,) when *Bowly* pretended that he was entitled to the said land, or to some parts thereof; and on the 29th of September 1804, *Daniel Bowly* brought an action of ejectment in the general court, which is now depending in *Baltimore* county court, against the said *Daniel Lammot*, alleging that the said *Bowly* was entitled to the said land, or to some part thereof, under and by virtue of the will of *William Lux* herein before referred to. That the whole of the purchase money agreed to be paid by *Lammot* for the said land, having been paid by him to *Gough*, the said *Gough*, did by his deed, ex-

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tuted, acknowledged, and recorded according to law, and dated the 9th of May 1801, convey the above described land, being part of *Chalsworth*, to *Lammot* in fee simple; that *Daniel Bowly* always lived within or near the city of *Baltimore*, adjoining to it, and within what is called the western precincts thereof the said land is situated, and that *Bowly* had early and full knowledge of the contents of the said will of *William Lux*, his uncle, (his own name being particularly mentioned in said will,) that he had as before set forth, full, perfect, and exact knowledge of the contents of the said deeds herein referred to; and with all the circumstances, motives, and considerations which accompanied and influenced the execution of them, having participated therein as aforesaid; and further that *Bowly*, by writing under his own hand, did furnish instructions in part to the surveyor, appointed to lay out the lands purchased as aforesaid from *Russell*. Yet that *Bowly* having thus knowledge of, and acquiescing in the long and continued possession and occupation of said land, by *Lammot*, never suggested or pretended that he had any title or interest, either at law or in equity, in or to the said land or property, or in or to any part thereof, until in or about the year 1804, and shortly before the institution of the said action of ejectment, and long after *Lammot* had paid the whole purchase money for the said land to *Gough*, and *Gough* had executed the said deed. The bill then states the death of *Lammot*, and that the complainants are his heirs and devisees. It also states the death of *Bowly*, and that the defendants (now appellees) are his heirs, &c. who have become parties to, and are now prosecuting the said action of ejectment against the said complainants, who have become parties to, and are now defending the said action; that the said heirs of *Bowly*, and the complainants, have severally succeeded, and become entitled to all the rights, claims and interest, of their respective fathers, in regard to the land herein before described, and held in possession by *Lammot* in his life-time. Wherefore the complainants represent, that they are justly and equitably entitled to hold and enjoy the lands and premises herein before particularly described and conveyed as aforesaid, (except so much thereof as *Lammot*, in his life-time, sold or leased,) free, clear and discharged, of and from all claims, title, demand or interest, in or to the said

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land, or in or to any part thereof, of the heirs of *Bowly*, or of any person or persons claiming under him, them, or either of them. And that if the said heirs have any title at law, in or to the said land, or to any part thereof, (which the complainants do not admit,) yet they are not, in good conscience or equity entitled to claim, recover, or hold the said land, or any part thereof, but on the contrary, they are altogether destitute of all just rights or equitable interests therein or thereto, and to every part thereof.

Prayer, that the defendants may be decreed to release all right, title and claim, or supposed title, in and to the said land purchased and possessed by *Lammot* as aforesaid, which may at law now exist or remain in the said heirs of the said *Bowly*, unto the complainants; and that the complainants may be righted and relieved in all and singular the premises, according to equity and good conscience, and that the defendants may stand to, observe, and perform such order and decree therein as the nature of the case requires, and shall seem meet, &c. The answer of the defendants admits that *William Lux* was in his life-time seized and possessed of the said tract of land, called *Chatsworth*, as stated in the bill of complaint; and they are informed and believe that he had been so seized and possessed of the same for many years before, and till his death, and at that time; and that for several years before his death, a rope-walk had been established by him and *Daniel Bowly* thereon, in partnership, which was carried on by him and *Bowly*, as partners, from the time of its erection until the death of *William Lux*. They admit that *William Lux*, being so seized of the said tract of land, did on the 5th of May 1773, duly make and execute his last will and testament, appointing thereby, *Daniel Bowly*, the executor thereof; by which said will, *William Lux* did, as they are informed and believe, devise to *Daniel Bowly*, in fee simple, five acres of land, part of the said tract called *Chatsworth*, including the said rope-walk, to be laid of as by said will directed; and so it has been, by the high court of appeals solemnly decided, in an ejectment instituted by the lessee of the said *Bowly* against *Lammot*, the father of the said complainants, and therefore they deny, that *William Lux* devised to *George Lux*, any part of the said five acres of land, but only so much of the said tract of land

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called *Chatsworth*, as remained free and clear of the same. That they are informed and believe the said *William Lux* departed this life on or about the 20th of February 1777, leaving his wife *Agnes*, at that time in full life, and that she afterwards departed this life on, &c. and that immediately after the death of *William Lux*, the said *Daniel Bowly*, having entered upon the said rope-walk, and the land adjoining, so devised to him, the said rope-walk was carried on for a considerable length of time by the said *Bowly* and *George Lux*, whom the said *Daniel* took into partnership with him in that business, and during that time, the said rope-walk was carried on by *Daniel Bowly* and *George Lux*, in the same manner as it had been before by *William Lux* and *Daniel Bowly*. They admit that *George Lux*, having arrived at full age, did on the 17th day of April, in the year of our Lord, 1787, duly make and execute to *William Russell*, a deed duly acknowledged and recorded, which they presume to be the same mentioned by the complainants in their said bill. But they say that the said deed purports only to convey such part of *Chatsworth*, of which he was seized in fee, and which he had not granted or conveyed away, and did not, nor could it, operate to convey to *William Russell*, any part of the said five acres of ground, so devised to *Daniel Bowly*, or any interest therein; nor have they any reason to believe that *George Lux* intended it should. That they are informed and believe, when *William Lux* died, *Harry Dorsey Gough* was possessed of a bond given to him by *William Russell* and *William Lux*, for the payment of £100 sterling, and dated on the said 12th day of December, 1769, which sum they are informed and believe to have been the proper debt of *William Russell*, and that *William Lux* was only his security. And also, that *Harry Dorsey Gough* was at that time possessed of another bond given by *William Lux* and *Daniel Bowly* to him, for the payment of £300 sterling, dated the 11th day of August, 1768, which was for their joint debt, and that the said principal sums, with a considerable amount of interest thereon, were remaining due and unpaid on the 20th day of June, in the year 1787. But they further say, that they are informed and believe, that at the time of the death of *William Lux*, he was largely indebted to *Daniel Bowly*, and that the said estate of said *William Lux* was

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indebted to *Daniel Bowly*, in a much larger sum than the said *Bowly's* proportion of the said joint bond so due to *Gough*, in consequence whereof it was the duty of *George Lux*, and *Daniel Bowly* had a right to compel *George Lux*, to pay and satisfy the whole of said joint debt to *Gough*, out of the estate of *William Lux*, which *George Lux* received, as heir or devisee of said *William*, and to indemnify him the said *Bowly*, against the said debt—And in consequence of the said deed of trust, *William Russell* was equally bound so to do. And at the same time, they allege that the estate of *William Lux*, which came to the hands of *George Lux*, as his heir or devisee, and which was so conveyed to *William Russell*, was much more than sufficient for that purpose. They here introduce and exhibit a plat of said tract, called *Chatsworth*, and certain parts thereof, and illustrations of said plat, which they consider necessary for the fully apprehending and better understanding certain facts, which they deem important to be stated and understood in the examination and decision of this suit; on which plat the said tract, called *Chatsworth*, is located, as beginning at the letter A, from whence the first five lines of said tract run, with the back lines, numbered with the black figures, 1, 2, 3, thence to the letter B, and thence to the figure 14, which line from the letter B, to the figures 14, is the 5th line of the said tract mentioned in said will, on which the said five acres are to be laid out in a long square, and the rope-walk aforesaid is represented on said plat by the narrow space between the two black lines extending from the small black letter *h*, to the letter K, through which runs the black broken line, which they are informed and believe represents the particular piece of ground, actually used and occupied as the rope-walk, and which, by the said devise, is directed to be included in the said five acres. They are informed and believe, that *George Lux*, before he executed said deed to *William Russell*, had entered into a contract with *Daniel Lammot*, whereby he had agreed, to sell to him a part of *Chatsworth*, containing 14 acres and one quarter of an acre, for the sum of £523 15s. current money, and contracted to convey the same by certain metes and bounds to him, upon payment of the said purchase money; which said 14 acres and one quarter of an acre are, as they are informed and believe, truly located on said plat, according to said metes and

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bounds;—Beginning at the small black letter *h*, on said plat, and running with the red drawn lines, numbered with the red figures, 1, 2, 4, 6, 7, and thence to the beginning. That they understand and believe, that after the execution of said deed to *William Russell*, the said *Daniel Lammot*, not having yet paid the said purchase money, it was agreed between *George Lux* and *William Russell*, that the money so due should be applied by *Russell* for payment of debts to be satisfied under the said trust, and that when the money should be thus applied, *Russell* should execute a deed for the said ground, so sold to *Daniel Lammot*; and that in consequence of said agreement, and a further arrangement which took place between *Russell*, *Lammot* and *Gough*, he, *Gough*, on the 20th day of July, 1787, received the said debt, so due from *Lammot*, as a present payment, to the amount thereof, made to him by *Russell*, in part discharge of the said debt, which was due to him on the said bonds, and for which *George Lux* was answerable to him, as heir and devisee of *William Lux*; and on the said 20th day of July, in the said year, *Gough* credited *Daniel Bowly* and *George Lux*, on account of said debt, (the said *Bowly* and *George Lux* having previously given to *Gough* their bonds for the balance remaining due on said original bonds,) by the said sum of £523 15s. And on the same day *Gough* charged *Daniel Lammot*, as debtor to him, with the same sum of money; and to secure *Gough* from any risk by reason of this arrangement, *William Russell*, who had the legal title in him by virtue of the said deed of trust, on the same day executed to *Gough* a deed, conveying to him the said piece or parcel of ground thus sold by *George Lux* to *Daniel Lammot*, which appears to have been conveyed to *Daniel Lammot* by *Gough*, on the 9th day of May, 1801, and not before. That they are informed and believe, that *Russell* afterwards, to wit, on the 2d day of April 1789, agreed to sell to *Gough* two acres more of the said tract of land, called *Chatsworth*, for the sum of £70, to be applied by *Gough* in part discharge of the said balance still remaining due to him, and the same day *Gough* gave the credit accordingly. That they believe this purchase was made by *Gough* for *Daniel Lammot*, because it appears, that the same day *Gough* charged him as his debtor for that same sum, on account of said two acres of ground, and did af-

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terwards convey it to *Lammot*, by the same deed by which he conveyed to him the said part before sold to him. And that *Gough*, having neglected to record in due time the aforesaid deed executed to him by *Russell*, the said *Russell* did, on the 27th day of April 1789, by his deed, duly executed, acknowledged and recorded, convey unto *Gough*, both the said parcels of ground, to wit, the said 14 acres, and one quarter of an acre, and the said two acres of ground; which said two acres are truly located, as they are informed and believe, according to the said metes and bounds, by which they are described in said deed on said plat, beginning at the red figure 3, opposite the north side of *Fayette street*, and running with red lines, numbered with red figures, 4, 5, 4, and thence to the figure 3, the beginning. That *Daniel Bowly* had not, any time before either of those sales, located or established any lines, metes or bounds of the said five acres of land, so devised by the said will, according to which they should be held by him; but that no part of said parcel of ground which *George Lux* so sold to *Daniel Lammot*, interferes with, or even is contiguous to the rope-walk, except a small portion thereof on the north, and not exceeding half an acre; but that in fixing the metes and bounds by which it was laid off and sold, there seems to have been peculiar attention that it should not interfere in general with any probable location which could be made thereof, agreeably to said devise. They do not admit, nor do they believe that *Daniel Bowly* was privy to, or perfectly acquainted with, or in any manner assented to even the first of these sales, at least so far as the same interfered with the said rope-walk, or that he had any knowledge it did thus interfere therewith, or with the five acres thus devised; nor do they believe *Daniel Bowly* was privy to, or perfectly acquainted with, or in any manner assented to the sale of the said two acres, or had any knowledge that it in any manner interfered with said devise, until after the settlement that is stated to take place between him and *Gough*; but they are informed by those who were intimate with *Bowly* about that time, and they believe, that he was ignorant of the said two acres having been sold by *Russell* when made, or that it interfered with the said devise, and that when he discovered it, he uniformly expressed the utmost surprise and indignation at the conduct of *Russell* in so doing. And as to the

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allegation that *Daniel Bowly* was in fact and reality a party in those transactions, they believe it utterly destitute of foundation, for they say that they believe he considered himself no more than nominally concerned or interested in them; for though he was answerable to *Gough*, as far as he was a party to the said debt, yet as the estate of *William Lux* was indebted to him to a large amount, much more than his proportion of, or even the whole debt due to *Gough*, for the payment of which *George Lux* was answerable as heir and devisee of his said father, and as the property held by him under his said father, while held by himself, and afterwards thus conveyed in trust to *Russell*, was greatly more than sufficient to discharge all *William Lux's* debts, they apprehend that *Daniel Bowly* could not contemplate suffering any inconvenience to himself; and as he was engaged in other concerns of his own which engrossed all his care, time, and attention, he was less likely to trouble himself with those in which he could not suppose himself particularly interested; and the less so, as at that time, during those transactions, they believe he had no doubt of the honesty and uprightness of either *George Lux*, or *William Russell*, both of whom were his near relations and avowed friends, and whose disposition to discharge him from any responsibility on account of the said debts due to *Gough*, he could have no reason to question; and so far was that from being the case, that it was the original intention of *George Lux*, to have conveyed the said property to *Daniel Bowly* as his trustee, who declined it, because his other business and occupations would not give him sufficient leisure, and recommended it to him to make the deed to *Russell*. That *Daniel Bowly* did at length lose that confidence in *William Russell*, partly, probably on account of his having, under pretext of the said deed, thus acted to the prejudice of him, *Bowly*, and partly in consequence of his having, in many instances, wantonly sold the property which had thus been conveyed to him in trust, below its value, and applied the money to his own use, and therefore *Bowly* instituted, or caused proceedings to be instituted against *Russell* to vacate the said trust, to prevent further misconduct. Whereupon by a deed, in which *George Lux* joined with him, he, *Russell*, on the 7th day of May, 1796, conveyed to *Daniel Bowly*, all the said property contained in the former deed

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of trust, which remained undisposed of by him upon the trusts mentioned in said deed thus executed to *Daniel Bowly*. After which, *Daniel Bowly* having thus become seized of that property, out of the proceeds of which the remaining balance of those debts, due as aforesaid to *Gough*, was to be paid, he gave his own bond for the same, to wit, on or about the 6th day of June, 1799; that all those credits which had been given by *Gough* on the said account, against *Daniel Bowly* and *George Lux*, had been given by direction of *Russell*, in consequence of transactions which had passed between *Russell* and *Gough*, in which it does not appear, nor do they admit or believe *Daniel Bowly* had any participation; that the said balance, as stated, was simply the sum that appeared to remain due after adding up the debits and credits; and therefore, supposing *Daniel Bowly* did sign the said balance, together with *Gough*, which they do not know or admit, and which they think immaterial, it amounted to nothing more than an admission on his part, that the difference between the debits and credits, as so stated and entered in said account, was equal to that sum, as it actually was. It is not suggested that the debits are erroneous, and it could not have been his duty to have objected to the credits, which had been entered under the direction of the parties to the transactions; but from this fact no inference can be drawn that *Daniel Bowly* knew that the pieces or parcels of land, for the price of which some of the credits had been given, were situate in such a manner as to interfere with said devise, even if he took notice that the said credits were on account of land sold, for he well knew that *George Lux* had conveyed in trust to *Russell* a much greater quantity of land, which did not interfere with said devise; than was necessary for the payment of all the debts for which he was answerable, instead of the trifling sum for which credits were given in that account, and he could not suspect that *Russell*, in selling these lands, had violated his duty by selling lands which he had no right to dispose of; and they deny, that it was on any settlement or adjustment between *Bowly* and *Gough*, that credit was given for the said sum of £523 15s. the price of the said 14 acres and a quarter of an acre of land, as suggested in said bill of complaint. They admit, that the money arising from the said sales was applied by *Russell* and *Gough*,

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to the extinguishment of so much of the debt as was due from *Lux* and *Bowly*; but say it was for a debt, for which, though the said *Bowly* was nominally answerable to *Gough*, yet *George Lux* was under obligations to *Bowly*, to pay wholly to *Gough*, and was able to pay it; and they utterly deny that *Bowly* received great or important advantages thereby, because they say, that as there was abundant property belonging to *George Lux*, and conveyed in trust to *Russell*, to have paid the same amount, which was liable for the said debt, and which *Bowly* might have compelled to be applied thereto, it could not, therefore, be a valuable or important advantage to *Bowly*, that his own property should have been illegally and needlessly sold, and that greatly under its value, and applied for payment of a debt, which ought, in justice, equity and conscience, to have been wholly paid by *George Lux*, or by *Russell*, out of the proceeds of the property which had belonged to *George*, and which he had conveyed in trust to *Russell*, among other things, for the payment of that very debt. As to the allegation here again repeated by the complainants, that *Bowly* had the most intimate and exact knowledge of all the circumstances, they do not admit or believe it to be true, nor do these respondents know or believe that *Daniel Bowly* furnished instructions under his own hand, or in any other manner to the surveyor, or to any other person, directing the said land to be laid out in the manner it was sold, or interfering with the said devise, for the purpose of its being thus sold; but they think it probable enough, that after the said sale, he may have furnished instructions to the surveyor to lay out or run the land by the courses, according to which it had been sold, to discover its actual position, and whether it did interfere with the said devise. They admit that *Gough* never himself had actual possession of any part of said property so conveyed to him. And that the rope-walk aforesaid, at the time *William Lux* died, was situated in an old field, constituting part of the farm or plantation of *William Lux*, and which old field, except the small part occupied as a rope-walk, was cultivated or used for pasture, as part of his said farm, all which remained in the same situation for a long time after the death of *William Lux*, and they believe, till the time when the said sales were made as aforesaid, and had become an open common, and for some time

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after; that the said old field contained within its extent, not only the said rope-walk and both the said pieces of ground so sold, but the piece of ground comprised within the four red lines located on said plat, beginning at the red figure 4, then running to the red figure 5, to the red figure 6, then to the red figure 7, thence to the beginning, (with-in which lines the letter T is inclosed,) as well as additional ground, all which lay in one common field, without being separated, the one part from the other, by any fencing or inclosure. That when *Daniel Lammot* made the said purchase from *George Lux*, or shortly after, they are informed and believe, he did enter upon some part of the said land contained within the metes and bounds mentioned, as including the said $14\frac{1}{4}$ acres, and made improvements thereon, by erecting a tan yard, where he carried on a tannery, but that these improvements were made by him a considerable distance from the five acres so devised, and upon the part which *Russell* had a right to convey, as laying clear of the devise to *Bowly*; and these respondents do not know or admit, that *Daniel Lammot* did by virtue of the said purchases, actually take possession of any part of the said land so devised to *Daniel Bowly*, until many years after the same had been thus sold as before stated; and although *John Eager Howard* and *George Lux*, contemplating the probable extension of *Baltimore-town*, and the advantage which in that case, it might be to their property, agreed upon a street to be called *Union-street*, to be established between them, yet at that time neither the said town nor precincts included the place, but the ground thus fixed upon for a street, constituted part of the old field, as far as the same was situate within the tract called *Chatsworth*, or was part of a common, as they believe and are informed, and was without improvements thereon; and though they admit *Daniel Bowly* lived the greatest part of his time in the city of *Baltimore*, or within a few miles thereof, yet he might certainly have lived thus near to those parts of the said tract, without knowing that *Daniel Lammot* had purchased land, the lines of which included, or that he claimed title to any part of the five acres devised to him, as long as the ground lay either in an old field or a common, without any part of the said five acres, or if any only a very small part of the same, being actually in the possession or occupation of *Daniel Lammot*, and the more probably so

as his time and attention was so entirely engrossed with other concerns. They admit that *Daniel Bowly* was, from the death of said *William Lux*, well acquainted with the instrument of writing, executed by *William Lux*, as his last will and testament; yet they believe and are assured, that he was not well acquainted with his rights under that will until some time after, nor of the legal effect and operation of the said devise to him therein, but was induced erroneously to think that he was to take nothing by that devise, unless *George Lux* should die under the age of 21 years, and without issue, which was, as they understand, the mistaken construction generally given to that devise, and that which was given to it by the court of *Baltimore* county on the trial of said ejectment; it is not therefore to be wondered at, that *Bowly* should thus have remained in an error himself; and they believe that until he was informed by an intimate friend of legal knowledge, who had occasion to examine the said will, that by the said devise he had an immediate right to the said 5 acres, *Daniel Bowly* did remain in that error; and they are informed and believe, that a considerable time, several years before he instituted said ejectment, *Daniel Bowly* was in actual possession of a house which stood upon the said 5 acres, at the place where the letter T is marked on said plat, and the lands around and adjoining to it; which house, and a part of the said ground, constituting part of the said 5 acres, have been ever since held by *Daniel Bowly*, or those claiming under him, and are yet so held; and they further say, that they are assured and they believe, that the reason why *Daniel Bowly* did not sooner bring his said ejectment, was his desire and hope to have settled the dispute with *Lammot* amicably, and that he a long time before bringing his suit, did inform *Lammot* of his claim, and endeavoured to come to a settlement with him, and that it was not until he lost all hopes of accomplishing that object that he instituted the said ejectment to obtain a legal decision upon his right and title under the said will. That though they do not know or admit that *Daniel Bowly* was in any manner privy to or acquiescing in the said first sale, as far as it interfered with the said rope-walk, or the said devise; yet should that appear to be the case, they feel the most perfect conviction it was owing to and during the time of his ignorance of his right, for nothing can be more improbable or absurd, than

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to suppose that he would thus needlessly have consented or permitted land; to which he thought himself entitled, to be thus sold for the payment of debts due from *William Lux* and himself, which *George Lux* was bound to pay; when the said *George* had such ample means for payment out of his own property, which was answerable for it; and that he would so wantonly sacrifice, for so trifling a consideration, property, which from its vicinity to *Baltimore-town* was certain to become so highly valuable. And from what was the conduct of *Daniel Bowly* after he became informed of his right, it may be reasonably inferred what would have been antecedently his conduct, had he earlier known his right. But should it appear that *Bowly* has, in any manner, been consenting, for any reason, to the sale of the small part of ground, which according to the first sale interferes with the 5 acres by the location, he has claimed it as located on said plat, so far that the complainants should be considered entitled to relief, as to that part; they contend that they in equity are entitled to be recompensed for it, by being permitted to extend the long square in width so far as to contain 5 acres, clear of that small part; and they say that on the said plat, the 5 acres claimed by *Daniel Bowly* is included in the parallelogram, formed by the lines, beginning at the letter I, running to the figure 19, to the figure 20, to the figure 14, and thence to the beginning; they say, that of the whole $16\frac{1}{4}$ acres so conveyed to *Daniel Lammot*, they do not include 2 acres, they believe of the ground so devised to *Daniel Bowly*, therefore *Daniel Lammot*, and those claiming under him, hold and enjoy at least $14\frac{1}{4}$ acres of the land so conveyed to him, the title to which is not contested, and this has cost him no more than £593 15s. much less they believe, than what it was worth at the time he purchased it, and is, they believe, at this time independent of the improvements thereon, worth not less than \$50,000. They admit, that *Daniel Bowly* instituted an ejectment against *Daniel Lammot*, for the purpose of recovering so much of the said land devised to him, of which *Daniel Lammot* had taken possession, which, on the abolition of general court, was sent to the county court of *Baltimore* county, to be there tried. That at the said trial, the judges of the said court were of opinion, that *Bowly* took nothing by the said devise; that the judges of the court of appeals having reversed their judgment, the

record was by *procedendo* sent back to said county court, where the said suit is now depending, the said proceedings, a copy of which these respondents exhibit. They admit also, the death of *Daniel Bowly*, and that the said defendants are his heirs and representatives. They also admit, that *Daniel Lammot* is dead, and that the complainants are his heirs and representatives, and have succeeded to his rights. They further say, that most of the transactions concerning which they are called on to answer, took place at a time when some of your respondents were not in the *United States*, and when others of them, from their youth, and other circumstances, could have little or no knowledge of them, but that they have endeavoured to obtain what information they could, and having no reason to doubt its correctness, they thus answer and submit themselves to such decree in the premises as to this honourable court shall seem agreeable to equity and good conscience. Without that, &c.

There was a general replication to the answer, and by agreement of the parties testimony was taken and returned, and a *pro forma* decree passed, dismissing the bill of complaint. From that decree the complainants appealed to this court.

The cause was argued at the last June term, before BUCHANAN, Ch. J. EARLE, MARTIN, and STEPHEN, J.

Williams, Taney and *Harper*, for the Appellants, in arguing upon the law in the case, contended, 1. That *Bowly* must be presumed to have known his rights under the will of *William Lux*. That he did know them was partly admitted by the answer, and clearly proved by the evidence; the maxim, therefore, that *ignorantia juris non excusat*, fully applied to this case. They cited *Pockley vs. Pockley*, 1 *Vern.* 36. *Hobbs vs. Norton*, *Ibid* 136. 4 *Vin. Ab.* 387, pl. 3. 1 *Fonbl.* 163, (and note.) *Doct. & Stud.* 79, 151, 152, 251. *Mildmaye's case*, 1 *Coke*, 177. *Bilbie vs. Lumley*, 2 *East*, 469, (and notes.) *Stevens vs. Lynch*, 12 *East*, 38. *Shotwell vs. Murray*, 1 *Johns. Chan. Rep.* 516. *Lyon vs. Richmond*, 2 *Johns. Chan. Rep.* 59. *Williams vs. Hodgson*, in this court, at December term 1809; and *Beck vs. Thompson & Maris*, *Ibid* December 1819, per *Dorsey, J.*

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2. *Bowly* being cognizant of the facts, and bound to know the law, he is in the predicament of one who stands by and sees his property sold by another, without objecting or notifying the purchaser of his title. He is presumed to have acquiesced, and is clearly estopped from impeaching the sale. They cited *Sugd. L. V.* 522, (472.) *Hobs vs. Norton*, 2 *Chan. Ca.* 128. *Hanning vs. Ferrers*, 1 *Eq. Ca. Abr.* 356, pl. 10. *Mocatta vs. Murgatroyd*, 1 *P. Wms.* 393. *Pow. on Mort.* 463, 464. *Rob. on Frauds*, 130. *Niven vs. Belknap*, 2 *Johns. Rep.* 589; and *Taylor vs. Cole*, 4 *Munf.* 351.

3. *Lammot*, purchasing from *Russell* through *Gough*, is only presumed to look to the conveyance from *George Lux* to *Russell*; and the recording of *William Lux's* will was not constructive notice of its contents to *Lammot*, and is no evidence of actual notice. They cited *Morecock vs. Dickens*, *Ambl.* 678. *Bedford & Backhouse vs. Baccus*, 2 *Eq. Ca. Abr.* 615, pl. 12. *Cator vs. Cooley*, 1 *Cox's Rep.* 182. *Pow. on Mort.* 634. *Williams vs. Sorrell*, 4 *Ves.* 389. *Penland vs. Stokes*, 2 *Ball & Beatty*, 75. *Bushell vs. Bushell*, 1 *Sch. & Lef.* 90. *Latouche vs. Dunsany*, *Ibid* 157. *Underwood vs. Courtown*, 2 *Sch. & Lef.* 64. *Holliday vs. Aiken*, per *Chan. Killy* in 1808; and *Sugd. L. V.* 531, (*new ed.*)

4. But supposing *Bowly* and *Lammot* to be equally acquainted with the contents of *William Lux's* will—*Lammot* is a *bona fide* purchaser for a valuable consideration, without notice, and *Bowly* claims under a *voluntary conveyance*, as devisee. Courts of equity have, and justly, a strong leaning and predilection for such purchasers over volunteers. They cited 1 *Fonbl.* 168. *Sugd. L. V.* 522, 547, 557, (*new ed.*) *Malden vs. Menill*, 2 *Atk.* 8. *Warwick vs. Warwick*, 3 *Atk.* 293. 1 *Eq. Ca. Abr.* 333, 334. 2 *Eq. Ca. Abr.* 79, pl. 1. 1 *Ball & Beatty*, 271. *Jerrard vs. Saunders*, 2 *Ves. jr.* 454; and *Bovey vs. Smith*, 1 *Vern.* 144.

5. The facts and principles of law, applicable to this case, place *Bowly* in the condition and character of an actual *vendor* of this property—inasmuch as the purchase money was applied, with his knowledge and consent, to the discharge of a debt, for which he was bound as *principal* debtor. They cited *Sugd. L. V.* 443, 523, 534, (*new ed.*) *Jennings vs. Moore*, 2 *Vern.* 609; and *Niven vs. Balknap*, 2 *Johns. Rep.* 589.

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6. *Bowly*, by his conduct after he became trustee of *George Lux*, confirmed the acts of *Russell*, and made them his own. He ratified every thing which *Russell* had done in this transaction, after knowing the facts. It was his duty to know what his predecessor had done, and when it was not too late, to have corrected his mistakes—to have taken back his property, and restored the purchase money, either to *Gough*, or to *Lammot*. It is now too late to disavow *Russell's* acts. They cited *Bovey vs. Smith*, 1 *Vern.* 146, (*arguendo*.) *Murray vs. Palmer*, 2 *Sch. & Lef.* 486. *Mocatta vs. Murgatroyd*, 1 *P. Wms.* 394. *Newl. on Cont.* 499; and *Frost vs. Beekman*, 1 *Johns. Chan. Rep.* 296, 297.

7. Even if *Bowly* is not to be regarded in the light, either of a vendor, or of a trustee, under the circumstances of this case, his conduct is clearly fraudulent towards *Lammot*; and he is seeking to benefit himself by his own fraud. 1st. He stands by and sees his property sold by another, and permits himself, and indeed claims to be benefitted by seeing the purchase money applied to his credit for his own debt. 2d. Even if it was not his debt, but *Lux's*, he acted fraudulently in permitting *Lammot* to pay *Lux's* debts without consideration, and thereby increasing the means of an estate on which he was a large creditor, which if the estate was *insolvent*, was a direct benefit to *Bowly*. 3d. If the estate of *Lux* was *solvent*, then he acted fraudulently towards *Lammot* in not indemnifying *Lammot*, after he had possession of all *Lux's* estate in 1796; knowing, as he did, that the former had assumed, without consideration, the payment, or rather had paid £593 15s. of *Lux's* debts; and which estate he then represented as trustee. And these circumstances are, in their *fraudulent* character, immensely enhanced, by being connected with the fact, that the land, for which this money was paid by *Lammot*, is claimed by the witness, who is the participator if not the principal in this fraud.

R. Johnson, and *Wirt*, (Attorney General of U. S.) contended, that where both parties were equally under a mistake as to the rights of either, the party having the legal title is to be preferred.

1. *Bowly* had no notice at least of the sale of the two acres.

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2. If there was fraud it should have been taken advantage of in the trial at law.

3. If there was notice and no fraud, yet *Bowly* had no notice of his rights, and his acquiescence will not prejudice him.

4. Both parties present themselves equally entitled to equity; and

5. The parties were equally bound to take notice of *Bowly's* title, the will being on record.

On the second point, they cited *Le Guen vs. Gouverneur*, 1 Johns. Cas. 436. *Bright vs. Eynon*, 1 Burr. 596. *Boring's Lessee vs. Singery*, 4 Harr. & M. Hen. 404. *Attorney General vs. Singery* in this court, (June 1809.) *Boring's Lessee vs. Lemmon*, 5 Harr. & Johns. 223. 2 Poth. 385 to 391. *Moses vs. Macferlan*, 2 Burr. 1005. *Farmer vs. Arundel*, 2 W. Blk. Rep. 824.

On the third point—1 *Ruth. Inst. B. 1, ch. 8, 126.* 1 *Pow. on Cont.* 133, 134. *Welford vs. Beasley*, 1 Ves. 6. *Newl. on Cont.* 432, 433. 1 *Fonbl.* 45, 46, 161, (note m.) 2 *Poth.* 412, 413, 414, 417, 373, 329, 385 to 391, 408, 409. *Ancher vs. The Governor and Company of the Bank of England*, 2 Doug. 638. *Bize vs. Dickason*, 1 T. R. 285. *Farmer vs. Arundel*, 2 W. Blk. Rep. 824. *Williams vs. Bartholomew*, 1 Bos. & Pull. 326. 4 *Blk. Com.* 26. *Lansdowne vs. Lansdowne*, *Moseley's Rep.* 364. 2 *Pow. on Cont.* 195. *Sugd. L. V.* 166. *Bingham vs. Bingham*, 1 Ves. 126, 127. *Simpson vs. Vaughan*, 2 Atk. 33. *Turner vs. Turner*, 2 Chan. Rep. 81. *Pusey vs. Disbouverie*, 3 P. Wms. 316, 320. *Cole vs. Gibson*, *Ibid* 290. *Broderick vs. Broderick*, 1 P. Wms. 299. *Chesterfield vs. Janssen*, 1 Atk. 301, 354. *East India Company vs. Vincent*, 2 Atk. 83. *Evans vs. Llewellen*, 1 Cox's Rep. 333. *Dyer vs. Dyer*, 2 Chan. Ca. 108. *Cholmondley vs. Clinton*, 2 *Meriv.* 171. *Hunt vs. Rouzmanier*, 8 *Wheat.* 174. *Levy vs. The Bank of the U. S.* 1. *Binney*, 37. *Sugd. L. V.* 522, 557, (new ed.) *Malden vs. Menil*, 2 Atk. 8; and *Pearson vs. Morgan*, 2 Bro. Chan. Ca. 388.

On the fifth point—*Morecock vs. Dickens*, *Ambl.* 678. *Sexton vs. Wheaton*, 8 *Wheat.* 229. *Cholmondley vs. Clinton*, 2 *Meriv.* 171. *Sugd. L. V.* 508. *Frost vs. Beekman*, 1 Johns. Chan. Rep. 298, 299; and *Parkist vs. Alexander*, *Ibid* 398.

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STEPHEN, J. at this term, delivered the opinion of the court. On the 5th of May, in the year 1773, *William Lux* of *Baltimore* county, made and executed, in due form of law, his last will and testament, which contains the following clauses: "I give and bequeath to my dear wife, *Agnes Lux*, for and during her natural life, my tract of land and plantation called *Chatsworth*, with the dwelling-house, and all the buildings and improvements thereon, (save and except the rope-walk.") "I give and bequeath to my dear son *George Lux*, his heirs and assigns, my tract of land called *Chatsworth*, lying and being in *Baltimore* county, containing nine hundred and fifty acres; but in case my said son should die before he attains of legal age, and without issue, then I leave and bequeath the said tract of land, called *Chatsworth*, to my dear wife *Agnes Lux*, or her assigns, to be at her own will and disposal, as it originally was, (save and except five acres, to be laid off in a long square, on the south two degrees west one hundred and thirty-one perches line, being the fifth line from the beginning, and that said five acres, together with the rope-walk and all the buildings and improvements thereon, I give and bequeath to my dear nephew and partner, *Daniel Bowly*, his heirs and assigns." *George Lux*, on the 17th day of April, in the year 1787, by deed, reciting that whereas he was indebted to several persons in large sums of money, which he was desirous to discharge, and for other purposes therein specified, conveyed, among other property, all that part of a tract of land called and known by the name of *Chatsworth*, which had not theretofore been granted and conveyed, to *William Russell*, and his heirs, in trust, to sell and dispose of the same, and with the proceeds of sale to pay and extinguish the debts due by him, the said *George*, and the residue thereof, if any there should be, to appropriate in the manner by the said deed directed. On the 20th day of July, in the year 1787, *William Russell*, in virtue of the trust with which he was invested by the deed above mentioned, sold to *Daniel Lammot* fourteen acres and one quarter of an acre of land, in fee simple, being part of the said tract of land called *Chatsworth*. And on the second day of April, in the year 1789, the said *William Russell* sold to the said *Lammot* two acres more of said land, in fee, making in the whole sixteen acres and one quarter of an acre, for the consideration of five hundred and ninety-three pounds fifteen shillings current mo-

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ney. *William Lux* and *Daniel Bowly*, being indebted to a certain *Harry Dorsey Gough* in the sum of five hundred pounds, by bond bearing date the eleventh day of August, in the year 1768, it was agreed between the said *Russell*, *Lammot* and *Gough*, that *Gough* would credit the bond of *Lux* and *Bowly* with the amount of the purchase money, and that the land, so as aforesaid sold, should be conveyed to *Gough*, to make the same responsible to him for the credit so given. In pursuance of said agreement, *William Russell*, on the 27th day of April in the year 1789, conveyed the said sixteen and a quarter acres to *Gough*, in order to make the same responsible to him for the credit so given. On the 9th day of May, in the year 1801, *Gough* conveyed to *Lammot* the said sixteen and a quarter acres of land, for the consideration therein specified. It appears, from the proof in the cause, that *Bowly* had perfect knowledge of the sale of the fourteen and a quarter acres of land, and of the location thereof, and there is reason to believe, from the testimony, that he also knew of the second sale of the two acres. It further appears from the evidence, that on the days when the said sales were respectively made, the bond of *Daniel Bowly* and *George Lux* was credited with the amount of the purchase money, stipulated to be paid for the sixteen and a quarter acres of land sold as aforesaid; the bond of *William Lux* and *Daniel Bowly* having been substituted, after the death of *William Lux*, by the bond of *Daniel Bowly* and *George Lux*. In what character *Bowly* stood bound in the original bond, whether as principal or surety, no where expressly appears from the proof; though it is strongly to be inferred, from the circumstances in the case, that they were both bound as principals, as if they were not, it is not to be believed that *Lux* would have assumed upon himself a liability to pay the debt after the death of his father. The said *William Russell*, by deed bearing date the 7th day of May 1796, relinquished his trust to *Daniel Bowly*, who on the 6th of June 1799, substituted the bond of *Bowly* and *Lux*, by his own obligation to *Gough*, for £1000, which it is presumed he was induced to do, as he had succeeded to the trust originally vested in *Russell*, and had thereby obtained possession of *George Lux*'s property, which he was authorized to apply to the payment of his part of said debt. Although the bond of *Bowly* and *Lux*

was credited by *Gough* with the amount of the said sales of 16½ acres of land, sold by *Russell* to *Lammot*, it does not appear that *Bowly* derived any benefit or advantage by such credit, because it amounted to very little more than *Lux's* one half of the debt, supposing them to be equally bound, (which, from the facts and circumstances in the case it is presumed they were;) and because it further appears, that the bond from *Bowly* to *Gough*, which was substituted for the bond of *Bowly* and *Lux*, was satisfied and paid with *Bowly's* own funds; and because it further appears from the testimony in the cause, that *William Lux*, at the time of his death, was considerably indebted to *Bowly*, for the payment of which debt, the property of *William Lux* was more than sufficient. It appears from the testimony of the late Judge *Ridgely*, who was the intimate friend and legal adviser of *Bowly*, that although *Bowly* was well acquainted with the devise to him in the will of *William Lux*, yet he never believed that he became entitled to the land thereby devised, till the death of *George Lux* without issue; and that after the death of *George Lux's* son, and he thinks also after the death of his wife, he was consulted by *Bowly* on the legal effect and operation of certain clauses in *William Lux's* will, and particularly with regard to the rope-walk which was erected upon the five acres of land devised to *Bowly* by the will of *William Lux*; and that the opinion which he gave to *Bowly* was, that he became entitled to the rope-walk, and the land appertaining to that establishment, under said will, independent of the contingency of *George Lux's* death without issue. Some time after *Bowly* had obtained this opinion, he instituted an action of ejectment in the late general court, for so much of the five acres as *Lammot* purchased; on the abolition of which court, the cause was sent to *Baltimore* county court, to be there tried; the judges of that court were of opinion that *Bowly* took nothing by the devise, from whose judgment there was an appeal to this court; and at June term 1810, the judgment of the county court was reversed, and the case remitted to said county court, with a *procedendo*, where the suit is now pending. The complainants, who are the representatives of *Lammot*, filed a bill on the equity side of *Baltimore* county court, to obtain an *injunction* to stay proceedings at law, and to have a conveyance of all the right and title of *Bowly's* re-

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presentatives, to the purchases made by *Lammot* in his life-time, executed to them. The county court, with the consent of the parties, decreed *pro forma* a dismissal of the complainant's bill, with costs to the defendants; from which decree the defendants have appealed to this court. The question now to be decided is, whether or not they have shown sufficient grounds of equity to entitle them to the relief, which they come here to obtain? And whether they are so entitled, depends upon the agency which *Bowly* had in the purchases made by their deceased ancestor, and the knowledge he had of his rights at the time they were made. The principle involved in the decision of this question is an important one, as well on account of its immediate bearing upon this case, as of the influence and operation it may hereafter have in deciding questions of title which may arise under similar circumstances. The question presented for the decision of this court is simply this, whether a man, having a legal title to a parcel of land, but who is ignorant of his right, forfeits his title to that land, by concealing his right, when he knows that another is about to purchase it from a third person? And this question is to be decided upon the principles of equity and conscience, which can never inflict a punishment upon innocence, or decree a forfeiture, when there has been no fault. On the contrary, it is at all times the anxious wish of a court of chancery to relieve against forfeitures and penalties, where the principles of justice and equity do not forbid it. Has then the conduct of *Daniel Bowly* been such as to merit the infliction of punishment at the hands of this court? Because a punishment it is termed by the authorities which treat upon the subject, and they speak of the forfeiture as a punishment inflicted by reason of the guilt of the party in not disclosing his right. It would, at the first blush, seem quite sufficient to ask, how can a man disclose a title of which he has no knowledge? To the common sense of the world this would seem to be an impossibility, and the law, which is a system of written reason, never enforces a vain or impossible thing. It is proved by all the witnesses who speak upon the subject, that they never heard of *Bowly's* claiming any title to the property in question, until long after the purchases were made by *Lammot*, and all of them were his neighbours, and some of them his most intimate friends. Nor is it a matter of surprise that *Bowly* was unacquainted with

the operation of law upon that clause of *William Lux's* will, under which his representatives now claim title to the property in controversy, since it appears that the judicial tribunals of the state entertained different opinions upon the true construction of it, aided as they were by all the lights of science in their exposition of it. It may then be safely assumed to have been at least a doubtful question, and one upon which it is not unreasonable to say, that *Bowly* might have been in the dark. If then he was ignorant of his title, what says the law upon the subject? In *1 Powell on Contracts*, 131, 132, 133, after stating that there might be either an express or tacit assent to a contract or agreement, he says, "a tacit assent may arise in several ways—It may be inferred from inaction, or forbearance of acting. Thus a man, by his silence, in case he be present, and acquainted with what is doing, is supposed to give his assent to what is then done; unless it appears that he was awed into silence, or any way hindered from speaking." "And in such cases, assent is presumed even against an infant; for it is meant as a punishment for his concealing his right, by which an innocent person is drawn in to advance his money." If then a tacit assent is imputed to infants, who are peculiarly the objects of a court of chancery's care and protection, it can only be upon the ground of knowing their rights, and a culpable and fraudulent concealment of such knowledge. The same author says, in page 134, "in order to warrant us in concluding from a man's silence, that he has relinquished his right, two things are necessary—The first is, that he should know that what belongs to him is conveying to another; for when one forbears to act through mere ignorance, it can have no effect"—and "secondly, that he should be voluntarily silent, though he has full liberty to speak." So in *1 Fonblanque*, 161—The author says, "there is also an implied as well as an express assent; as where a man, who has a title and knows of it, stands by, and either encourages, or does not forbid the purchase, he shall be bound, and all claiming under him, by it. Neither shall infancy or coverture be any excuse in such case. And this seems a just punishment for his concealing his right, by which an innocent man is drawn in to lay out his money." It is then upon the principle, that the party committed a fraud by concealing his right, that he becomes bound, and all claiming under him. In *Niven vs.*

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Belknap, 2 *Johnson's Rep.* 589, the same principle is recognized by *Thompson*, Justice, that where a man has a title, and knows of it, and either encourages, or does not forbid the purchase, he, and all claiming under him, shall be bound by such purchase; and in support of his opinion he refers to 1 *Fonblanque*, 161. In *Levy vs. The Bank of the United States*, 1 *Binney's Rep.* 27, the case was this; a forged check was credited as cash in the holder's bank book, and he being afterwards informed that the check had been forged, under a mistake of his legal rights, agreed that if the check was a forgery, he would not take advantage of the deposit. *Shippen*, chief justice, decided, that the party was not bound by his agreement, it being made under a mistake of his right. In this case the chief justice says, "the case of *Penn and Lord Baltimore* is decisive to this point. I was present at the agreement half a century ago, and heard Lord *Hardwicke* say, though it is not mentioned in the printed report, that if Lord *Baltimore* made the agreement in question, under a mistake of his right to another degree of latitude, he ought to be relieved, but that he was not mistaken." In *Green vs Price*, 1 *Munford*, 453, Judge *Tucker* lays down the law to be, that if a man has an equitable title to lands, and knows of it, and either encourages, or does not forbid the purchase, he, and all claiming under him, shall be bound, by it; and in support of his opinion he refers to 1 *Fonblanque*, B. 1 ch. 3, s. 4. Thus it appears, that some of the most enlightened and eminent judges of our country, have given their sanction to the doctrine, that a party is not bound by his silence, unless he has a knowledge of his right, and fraudulently conceals it where he ought to speak. In *Bize vs Dickason*, 1 *T. R.* 285, Lord *Mansfield*, in delivering the opinion of the court, is reported to have said, "the rule had always been, that if a man has actually paid, what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action." *Evans*, in his essays, treating upon mistakes of law, lays down the law to be, that where no natural obligation intervenes, even what is paid under a mistake in law, may be recovered back; and he refers, in

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support of his opinion, to certain decisions of Lord *Kenyon* and Lord *Munsfield*, to the same effect, and observes, that he conceives it may now be positively stated, that this opinion is adopted in the *English* law. In *Evans vs. Llewellyn*, 2. *Brown's Chancery Cases*, 150, it is decided, that a conveyance obtained from persons uninformed of their rights, should be set aside, though there was no actual fraud or imposition. In *Hunt vs. Rousmanier*, 8. *Wheat*. 214, the chief justice, in speaking of the case of *Lansdowne vs. Lansdowne*, says, if it be law, it has no inconsiderable bearing on this cause. There are certainly strong objections to this decision in other respects; but as a case in which relief has been granted, or a mistake in law, it cannot be entirely disregarded. He then goes on to say—"Although we do not find the naked principle that relief may be granted on account of ignorance of law, asserted in the books, we find no case, in which it has been decided, that a plain and acknowledged mistake in law, is beyond the reach of equity."²² We have here, then, the high authority of this most distinguished man, and eminent judge, that a party acting under a clear and unequivocal mistake of his legal rights, is entitled to relief in a court of equitable jurisdiction; and that the doctrine of a court of chancery is not, as has been contended, that equity will not administer relief upon that ground, upon the principle that every man is bound to know the law. It is not intended to say, that the plea of *ignorantia juris* would in all instances be available in civil cases, (in criminal it never can be,) because some legal propositions are so plain and familiar, even to ordinary minds, that it would be doing violence to probability to impute ignorance in such cases; but it is only meant to say, that where the legal principle is confessedly doubtful, and one about which ignorance may well be supposed to exist, a person acting under a misapprehension of the law in such a case, shall not forfeit any of his legal rights, by reason of such mistake. So *Newland*, in his treatise on contracts, says, that mistake or misapprehension of the law, is a ground of relief in equity; as if a man purchases his own estate, and pays for it, the court will order the purchase money to be refunded, on the ground that there was a plain mistake. It appears then, from what has been observed in the foregoing opinion, that some of the most enlightened

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and celebrated men, whose characters are recorded in judicial history, have given the sanction of their illustrious names to the doctrine, that no man, acting under a plain and acknowledged mistake of his legal rights, shall forfeit those rights, in consequence of such misapprehension. The authorities in support of this principle, might be multiplied to an almost indefinite extent, but it is deemed unnecessary further to enlarge upon the subject. It is the opinion of this court, that the decree of the court below be affirmed, with costs to the appellees. DECREE AFFIRMED.

JUNE.

CHEW vs. GARY.

A, by will, bequeathed her slave Mary, to B, for life, and that at B's death, Mary was to be free. During the life of B, Mary has issue, such issue are slaves

APPEAL from *Anne Arundel* county court. The appellant, on the 14th of June 1822, filed in that court his petition for freedom, against the appellee, representing that *Mary Ann Wood*, on the 10th day of October 1800, made her will, in which is this clause: "My will and desire is, that all my negroes shall be free, except my negro woman *Nanny*; and my will is that she shall serve my mother, *Ann Brown*, during her life, and at her death my said negro woman *Nanny* to enjoy her freedom." This woman was the mother of the appellant. The appellant was born during the life of *Ann Brown*, and subsequent to the death of *Mary Ann Wood*, the testatrix, and claimed his freedom in virtue of the above clause in the said will. The defendant demurred generally to the petition; and the county court ruled the demurrer good, and gave judgment for the defendant. From that judgment the petitioner appealed to this court. The case was argued before BUCHANAN, Ch. J. EARLE, and STEPHEN, J.

Brice, for the Appellant. The only question for the consideration of this court is, whether the petitioner who, it is by the pleadings conceded, was born after the death of *Mary Ann Wood*, but during the life of *Ann Brown*, is by virtue of the clause in the will of *Mary Ann Wood*, liberating the petitioner's mother at the decease of *Ann Brown*, entitled to his freedom? He cited *Hughes vs Negro Milly, et al.* 5 *Harr. & Johns.* 310. The act of 1809, ch. 171; and *Negro Jack vs Hopewell*, (*ante* 20, note.)

Brewer, jr. for the appellee, relied upon *Hamilton vs. Cragg*, (*ante* 16.)

JUDGMENT AFFIRMED.

THE CUMBERLAND BANK OF ALLEGHANY vs. M'KINLEY.

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JUNE.

APPEAL from *Alleghany* county court. *Assumpsit* on a promissory note by the holder against the payee. The defendant, (now appellee) pleaded *non assumpsit*, and the act of limitations. The writ issued on the 25th of October 1821. At the trial the plaintiffs produced in evidence the following note:

"85,350.

Alleghany County, Dec. 28, 1819.

Sixty days after date, I promise to pay *Henry M'Kinley*, or order, five thousand three hundred and fifty dollars, for value received, negotiable and payable at *The Cumberland Bank of Alleghany*.

James Kinkead."Endorsed "*Henry M'Kinley, Joseph Carter.*"

They also offered in evidence a protest of the said note; made on the 29th of February 1820. They then produced as a witness *John M'Neill*, who it was admitted was, on the 24th day of December 1819, and still was, a notary public of the state of *Maryland*, commissioned and duly qualified, residing in the town of *Cumberland*, and a competent witness in the cause; by whom the plaintiffs proved, that he the said *John M'Neill* was acquainted with the hand writings of *James Kinkead*, the drawer of the note, and *Henry M'Kinley* and *Joseph Carter*, the endorsers, and had frequently seen them write; that he believed that the signatures of the said *James Kinkead*, as drawer, and *Henry M'Kinley* and *Joseph Carter* as endorsers of the note, were in the proper hand writing of the said drawer and endorsers respectively; that the said *John M'Neill*, as notary public, on the 29th day of February 1820, presented the note for payment at *The Cumberland Bank of Alleghany*; and inquired for the said *James Kinkead*, for the purpose of demanding payment, who was not there; that he the said *James Kinkead* did not pay the said note, nor did *Henry M'Kinley* or *Joseph Carter* pay the same; and that he the said *John M'Neill* did then, as notary public aforesaid, protest said note for nonpayment, as by the protest appeared. The plaintiffs further proved by the same witness, that ever since his appointment as notary public, it was his uniform practice to give notice of nonpayment to endorsers, living out of *Cumberland*, by letters addressed to them by the next mail after the protest, to the post-office

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An endorser cannot maintain an action on a promissory note payable to order, where the indorsement is in blank.

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nearest the residence of the parties; that he believes that he never omitted to give regular notice in any case, and that he believed he gave such notice in this case, the defendant living at the time out of the town of *Cumberland*; but that he had no recollection of this transaction separate and distinct from the protest, and from his habit of doing business, and that his belief was founded merely on his habitual mode of doing business as notary, and his sense of duty to give notices. He further stated, that this was the first note ever protested by him. That on the day after the protest in this case, he called on *Matthew Wallace*, the cashier of the bank, and told him the said *Wallace*, he need not give himself the trouble after that time of sending notices, for that he the witness would give notices in all cases; and that from that conversation alone, he believes he obtained from *Wallace*, agent of the defendant, information of the place of residence of the defendant, but that he had no particular recollection of the fact; and that he had not then, and had not now, any personal knowledge of the place of residence of the defendant. On this evidence the defendant prayed the court to direct the jury, that the plaintiffs were not entitled to recover, which direction the court, [*Buchanan*, Ch. J. and *T. Buchanan*, A. J.] gave. The plaintiffs excepted; and the verdict and judgment being for the defendant, they appealed to this court.

The cause was about to be argued before *Buchanan*, Ch. J. *Earle*, *Martin*, *Stephen*, and *Archer*, J. by

Jones and *Speed*, for the Appellants; and by

Taney, for the Appellee,

When it appearing that the endorsements on the note were in blank,

THE COURT, upon that ground only, without examining or deciding any other point in the cause, affirmed the judgment of the court below. (a.)

JUDGMENT AFFIRMED.

(a) *Day, et al. vs. Lyon*, ante 140; and *Hudson vs. Goodwin*, 5 *Harr. and Johns*. 115.

WILLIAMS'S EX'RS. vs. THE MAYOR, &c. of ANNAPOLIS.

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Williams
vs.
Mayor, &c

APPEAL from a decree of the court of chancery. The bill was filed against the testator of the defendants, (now appellants,) on the 23d of November 1815, to compel him to take from the complainants, (now appellees,) a lease for a lot of ground in the city of *Annapolis*, which in 1785 they contracted to lease to the original defendant; and also to compel him to pay rent for the said lot. *Williams*, pending the suit, died, and a bill of revivor was filed against his executors. The statement in the bill is, that the city of *Annapolis* heretofore was seized and possessed of a number of lots in said city, and being anxious to lease out the same. *Williams* applied to the Mayor, &c. to lease, and on the 29th of September 1785, a lease was executed to *Williams* for certain property, particularly described in said lease, for 99 years renewable for ever, commencing on the 15th of April then past, paying the annual rent of £56 5 0. *Williams* entered upon the premises described in said lease, and ever since has used, occupied, and enjoyed the same, and still does, and paid the rent to the 15th of April 1803. After that time he neglected or refused to pay rent, and for recovery of it suit was instituted in *Anne Arundel* county court, to April term 1812. The lease was not acknowledged or recorded in the manner or place required by law, and *Williams*, although he held the premises leased, or intended to be leased, under the said lease, and paid the rents as aforesaid, took advantage of the legal defects in the lease, and the county court, upon an admission of facts, gave judgment in favour of *Williams*, in 1815. Besides being required to account and pay over the amount of said rents, and that a new lease may be executed, he was called on to answer, among other things, whether he did not make the agreement, and execute the lease referred to; whether he did not enter upon the premises by virtue thereof; and whether he did not still hold the same. The answer of *Williams* states, that he does not admit that the Mayor, &c. of the city of *Annapolis*, were seized and possessed of a number of lots, and especially denies all title in the said corporation to the lots which they pretended to lease to him, and leaves it to the complainants to establish their title thereto. He alleges that this lot, a part of five and a half acres of vacant land, was taken up by *Patrick Creigh* on the 6th of Fe-

W. in 1785, leased from *M & A*, for 99 years, renewable for ever, a lot of ground at a fixed rent, and c. remained in the lease to pay the rent. He entered upon the property, and paid the rent until 1803. The lease was not legally acknowledged or recorded. In 1812, *M & A* brought an action of covenant at law against *W.* to recover the rent, and failed, because of the defective execution and acknowledgment of the lease. *W.* and those claiming under him, remained in undisturbed possession of the property. In 1815, *M & A* filed their bill in chancery against *W.*, to compel him to account for the rents from 1803, and to accept a new lease formally executed. *W.* afterwards died, and the suit was revived against his executors.—Held, that the complainants were entitled to recover the rents, with interest, and that neither the judgment at law, nor the statute of limitations, could affect their claim. But that the executors of *W.* were not bound to accept a new lease.

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bruary 1748, and from the time of the grant thereof has been in the quiet possession of the grantee, his heirs or assigns. The title to this land became vested in *Richard Mackubin*, of whom the defendant purchased, and to whom he gave an extravagant price, and has expended considerable sums of money in its improvement. After this purchase and these improvements, the corporation set up a claim to the ground, and the defendant, being unwilling to be disturbed in his improvements, entered into a contract with them to lease the same. He afterwards became satisfied that they had no title to the property, and then refused to pay any rent, and would have applied to the court of chancery to vacate the contract, but it was discovered to be void. He admits the suit at law, and the decision in his favour, but he is advised that the court did not decide that nothing could be recovered at law from the defendant for the use and occupation; and he is advised, if the complainants could have proved that the defendant occupied the lot *as the tenant and by permission of complainants*, they must have recovered at law in a proper form of action, and *the defendant* could only have been relieved in equity. He insists that the relief sought by the complainants, if they are entitled to any, is exclusively at law; and he pleads and relies upon the judgment at law, and the act of limitations. He expressly denies that he entered on the premises in virtue of the lease; that he claims the fee simple, and again denies all title which the complainants may set up. The complainants exhibited the proceedings in two suits in chancery, *John Welch* against *Benjamin Welch* and *James Williams*, and *Robert Welch* against *James Williams* and *John Ross*. These suits have no relation to the present, and can only be introduced into the case because of a part of the answer of *James Williams* in the latter suit; in which he states, "that some time in the year 1785, there being a dispute between *Richard Mackubin* and the corporation of the city of *Annapolis*, as to the right of some water lots, this defendant wished to purchase, and in order to secure a good title, this defendant had to purchase or lease of both parties, for which he paid equal to one dollar per foot per annum." Testimony was taken, and surveys were made, &c. An application was made to the chancellor by the complainants, to order the defendant to produce the original lease, which order being granted, the original lease was

produced by the defendant, certified to have been recorded in the records of the general court, on the 5d of January 1786.

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JOHNSON, Chancellor, (July term 1822.) It being understood, that this cause, let the final decree be as it may, is to go to the court of appeals, for the ultimate determination of that tribunal, it is thought most advisable, before a determination is made on the merits of the cause, to direct, that the sum due to the corporation, (if it is entitled to recover,) should be ascertained; that the decree, when made, on the merits of the cause, should be final, so far as regards this court. For if the complainants are entitled to recover, then the decree would be for a specific sum; and on the appeal, the court of appeals would have the whole subject before them; that is, the right to recover, and the extent of the recovery. If the decree, after the account is made by the auditor, is in favour of the defendants, then on an appeal should the decree be reversed, the court of appeals would have every thing before them, to enable that court to give a final decree.—*Decreed*, that the auditor state an account between the parties, so as to ascertain the sum due from *James Williams*, deceased, on account of the property leased to him by the corporation of the city of *Annapolis* on the 29th of September 1785, from the evidence in the cause, or from such evidence as shall be laid before him, and report the same, subject to further order, reserving all equity at the final hearing.

The auditor, by his report, stated that there was due from *Williams* to the complainants the sum of \$4,495 87½, with interest on \$2,850, a part thereof, from the 30th of November 1822. To this report the defendants made sundry exceptions.

JOHNSON, Chancellor, (March term 1823.) On the 29th of September 1785, the complainants leased to *James Williams* a lot of ground, situated in the city of *Annapolis*, for the term of ninety-nine years renewable for ever, on the annual rent of £56 5s. current money; the lease contains the usual covenants, amongst which is the covenant for the payment of the rent; the lease is under the seal of the corporation, and is also signed and sealed by *James Williams*, but it was not acknowledged and recorded agreeably to

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law. *Williams* entered on the lot, and paid the rents up to the 15th of April 1803, when discovering (as it is presumed,) the defective execution of the lease, from that time he refused to pay; and on the 10th of March 1812, an action of covenant was brought against him by the corporation, in *Anne Arundel* county court, to recover the rents then claimed as due. The cause was tried on a case stated, in which it is admitted that the lease was executed "in the manner stated in and endorsed upon the aforesaid copy of the said lease; and the original lease recorded in the manner endorsed upon the aforesaid copy, and that the said lease never has been executed, acknowledged or recorded, otherwise than as appears upon the copy of the said lease filed in this cause by the plaintiffs." The copy of the record of *Anne Arundel* county court is filed as an exhibit in this cause, and by it, it also is admitted, that *Williams* "entered upon the said property, and the rent for seven years has been unpaid." Judgment on the case stated was given in favour of the defendant. The reasons for the decision do not appear, but it is to be supposed, the judgment of the court was in favour of the defendant, because the *legal* estate in the property did not pass by the lease.

From the period of the lease to the present time, *Williams*, and those claiming under him, have had the undisturbed possession. Foiled by the judgment of the court to recover the rents, on account of some legal informality of the lease, on the 23d of November 1815, the present bill was filed against *James Williams*, to compel him to account for and pay the rents then due, and to accept a new lease formally executed. In this bill the entering of *Williams* on the property, and his continuing to occupy and possess the same, is set forth.

On the 18th of May 1816, *James Williams* answered, and by his answer he denies "all title in the said corporation to the lots which they pretended to lease to this defendant." The lots stated to have been leased, the answer asserts, "were a part of five and a half acres of vacant land, not within the plat or survey of the said city; that the same was taken up," and patented to *Patrick Creigh*, about the 16th of February 1748; the title to which, by inheritance, was transmitted to *Richard Mackubin*, from whom the defendant purchased; and after he had

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purchased, finding that the corporation "did pretend to set up a claim to the ground, and this defendant, unwilling to be disturbed or hindered in his improvements, entered into a contract with them for leasing the same." But afterwards, finding that the corporation had no title, he refused to pay rents. The institution of the suit at law, and the judgment on the case stated, are admitted. The defendant insists, if the complainants have any right, the remedy should have been an ejectment for the property, or an action on the case for use and occupation; and he also relies on the act of limitations as a bar to the claim. The defendant, *James Williams*, having answered, died, when a bill of revivor and supplemental bill was filed against the present defendants, *James Williams* and *Lewis Neth*, junior, the executors, who the bill alleges have assets, which is admitted to be true.

As between the landlord and tenant, the title of the former is not to be called in question; if, therefore, the instrument of writing had been formally executed, acknowledged, and recorded, the rents at law could certainly have been recovered, and the tenant would not have been permitted to controvert the title. But as the instrument was informal, and incapable to pass the title of the corporation, (supposing it to exist,) a court of law competent to determine, have decided that the action of covenant could not be sustained. As the complainants failed to give a valid subsisting lease, they come into this court, founding their claim on the contract to lease, and the corresponding engagement to payment, offering to remove all the defects in the title intended to be passed, by executing formally a new lease on the terms of the engagement between the parties, and claiming the payment of the rents due, according to the stipulations of the parties.

One of the most ordinary grounds of the jurisdiction of this court is that of curing the defective execution of contracts, and of compelling the parties, by a decree of the court, specifically to comply with their engagements fairly and *bona fide* executed; and although a partial relief under the contract might be obtained at law, by the recovery of damages for a breach of the contract, yet the party having that remedy was not, and is not deprived of resorting to this tribunal, to carry the whole engagements into full and complete effect. If, therefore, the complainants could

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have maintained an action of ejectment to recover the property itself at law, or could there have sustained a suit for use and occupation, it by no means follows as a necessary consequence, that the jurisdiction of this court extends not to give a more ample and full relief to the parties. Had the ejectment been brought and sustained, although by it the complainants might have obtained the possession of the property, yet it would be held subject to the contract, and the possession regained by a decree carrying the contract into complete execution. Had the suit for the use and occupation been brought and sustained, yet the legal title to the property would have remained, at the termination of that cause, as at its commencement; and, (except by the voluntary acts of the parties it should be obviated,) before the legal estate in the property could have been obtained, resort must have been had to an equitable tribunal possessing the jurisdiction, and full and ample power, specifically to carry the contract into execution.

But although this court will carry contracts into execution when *bona fide* made, yet, no person will be compelled to accept a conveyance, and forced to pay a consideration, when the title is clearly not in the person contracting to sell or lease, or when well founded doubts are entertained of its validity. In the case before the court, since the year 1785, when the lease was executed, to the present time, the possession, and undisturbed, has remained, and still remains with the lessee and those claiming under him. The lessee alone, thinks proper to call the title in question, and sets up no other foundation, to impeach the right of the complainants, than was known to him at the time he leased.

At the period of his answer to the present bill, it does not appear that he acquired any new information on the subject. In the answer by *Williams* to the present bill he denies "that he entered on the premises by virtue of any lease of the corporation;" and yet in an answer filed by him, on the 22d of May 1806, to a bill filed by *Robert Welch*, touching the same property, and which case is made a part of this cause, he states, "that some time in the year 1785, there being a dispute between Mr. *Richard Mackubin* and the corporation of the city of *Annapolis*, as to the right of some water lots this defendant wished to purchase, and in order to secure a good title, this defendant had to purchase or lease of both parties," thereby admitting all his know-

ledge on the subject, and of course that the possession by him was acquired under the united title. In the case stated for the judgment of the court of law, it is expressly admitted, that *James Williams* leased from the corporation, according to the copy of the lease filed in that case, which corresponds with the original lease itself, filed and admitted in this cause; and that he "entered upon the said property, and that the rent for seven years has been unpaid." These admissions are abundantly sufficient to defeat the ground now assumed in regard to the entry on the property.

I do not perceive the necessity of going into the examination of the title to the property, but, so far as I have examined, I have no reason to doubt that it belonged to the corporation; but as *James Williams* leased from them, with a perfect knowledge of all the circumstances connected with it, equally as well then as at the time he answered the present bill, and as he and those claiming under him have remained, and still remain undisturbed and unmolested, the raising of doubts now in regard to the title, ought not, it appears to me, to prevent the contract from being enforced.

In order that the whole case might at once be presented to the court of appeals, where it is only to terminate, let the decree of this court be as it may, I thought it advisable on the 2d of September 1822, to pass an interlocutory decree; and on the 20th of November 1822, the auditor in pursuance thereof made his report, by which the complainants appear to be entitled to the sum of \$4495 87½ on that day, with interest on \$2850, part thereof, from the same time; and as the defendants, the executors, admit assets—*Decreed* that the defendants pay to the complainants, or bring into this court to be paid to them, the said sum of \$4495 87½ with interest on \$2850, a part thereof, from the 20th of November 1822, until paid or brought in, together with the costs of this suit.

As the original lessee is now dead, a new lease to him cannot be decreed, nor can it be conceived, that his executors ought to be compelled to accept one. But, on the payment of the money above mentioned—*Decreed* further, that in the event of the executors claiming a lease, that the complainants, before the money paid into court is received by them, shall in due form of law, duly execute and acknowledge another lease in conformity with the terms and stipulations of the one which is the foundation of this cause.

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From which decree the defendants appealed to this court.

The cause was argued before EARLE, MARTIN and ARCHER, J.

Magruder, for the Appellants. 1. The chancellor decides, that the court could entertain jurisdiction of the whole case, because it can give a more ample and full relief to the parties. 2. Although no person will be compelled to accept a conveyance and to pay a consideration, when the title is *clearly* not in the party contracting to sell or lease, or when *well founded* doubts are entertained of its validity; yet as *Williams* leased from them with a perfect knowledge of all the circumstances connected with it, equally as well then as at the time he answered the present bill, and as he, and those claiming under him, have remained, and still remain undisturbed and unmolested, the raising of doubts now in regard to the title ought not to prevent the contract from being enforced, and accordingly the chancellor does not perceive the necessity of going into an examination of the title. 3. The chancellor, without regarding the plea of limitations, or the judgment at law against the claim of the complainants, to rent up to the 15th of April 1811, decrees that the defendants pay the rent which has accrued since 15th of April 1803. 4. That the original lessee being dead, a new lease *cannot* be decreed unless his executors claim. All these points, (with the exception of the latter,) the appellants controvert, and contend,

1. That if the chancellor could not decree the specific execution of the contract, he could not enforce the payment of the *rent*, or entertain a suit in which the complainants could only recover what, if they were entitled to at all, could be recovered by them only in an action at law grounded upon the instrument executed, or in an action for use and occupation.

2. That at no period of time could the court of chancery compel the original defendant to take a lease, unless the complainants could prove their title to the property which they undertook to lease, that being expressly put in issue by the parties.

3. That if the complainants were entitled to recover rent for the occupation of the property, and their remedy was not exclusively at law; yet the judgment of the county

court is a conclusive bar to the recovery of the rent claimed in that suit. And further, that the plea of limitations, relied on by the defendant, is a bar to the recovery of a considerable part of the rent decreed by the chancellor; and if the rent could be recovered, no interest can.

4. The chancellor, in relying upon what he supposes to be the circumstances connected with the title, and *Williams's* supposed knowledge of them, as furnishing a reason for sustaining the contract, without examining the title, not only disregards the proof in the cause, but undertakes to decide matters which neither party designed nor attempted to put in issue, and to furnish the complainants with a case which they had not brought into court. It is not alleged, and therefore the chancellor had no right to decide, that the original defendant was bound by his contract to take a lease of the property, the title to which was doubtful, or was precluded by the terms of the contract from insisting that a clear title should be shown to exist in the complainants before the defendant was obliged to pay rent for the property.

The ground of the judgment in the county court in the action there brought, was that the lease had not been recorded in the proper office; this is not true in fact, for the lease was recorded in the office of the general court, within the time prescribed by law. The defendant was not bound to take so doubtful a title as has been proved in this case. *Sugd.* 206, 207, 208, 210. *Roake vs. Kidd*, 5 *Ves.* 647. If the purchaser's defence to a bill for a specific performance rests merely on the want of title in the vendor, he ought to depend on his answer, and not to file a cross bill to have the agreement delivered up; because the vendor can make no use of the contract if he has no title. *Sugd.* 156. *Hilton vs. Barrow*, 1 *Ves. jr.* 284. By the act of June 1777, *ch.* 3, leases by the corporation need not be acknowledged. The chancellor, in his decree, says that the defendant, having entered into the lease, the *onus probandi* lies on him to prove that there was not a good title in the lessors. Where a party contracts to take a doubtful title, then it may be enforced; but it must appear in the contract itself. *Sugd.* 205, 296. Here the title is put in issue; yet there is no proof of title. The complainants by their bill, set out their title, stating that they are seized in fee, &c. they cannot therefore rely on

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any other title than that under which they claim. The relief granted must be agreeably to the case made out by the bill, and cannot be different from it. *Cooper's Plead.* 6, 7, 13. At law, it is admitted, the defendant could not controvert the title of the lessors. The complainants had remedy at law for the rent due; and as the contract cannot be enforced against the present defendants, they not being bound to take a new lease, there was no case for the interposition of the court of chancery. There are cases where the party may go into chancery to recover rents due; but this is not one of those cases. Since the death of the original defendant, this suit is nothing more than for use and occupation. The chancellor did not regard the judgment at law, or the plea of limitations. The judgment at law was a bar to all rent claimed to that time; and the plea of limitations was a bar to all rent accruing for three years before the bill was filed. The chancellor not only decreed payment of all rent claimed, but also interest from April 1803 to 1822. If the complainants had a right to come into chancery for the rent, they had no right to interest.

Brewer, jun. for the Appellees. To show a title in the appellees to the property in question, he referred to the testimony in the cause, and the acts of assembly 1683, *ch.* 5; 1684, *ch.* 2; 1694 *ch.* 8; 1695, *ch.* 7, s. 2, 4; 1718, *ch.* 19; 1719, *ch.* 5; 1723, *ch.* 26; 1753, *ch.* 25; and June 1777, *ch.* 3. Under the act of 1718, *ch.* 19, a new plat of the city was directed to be made, the former plat having been destroyed by fire. The plat thus made has also been lost, or at least no record of it appears; but the complainants exhibited a plat which they contend, and which the proof establishes to be, if not the original, a true copy of that made under the last mentioned act. To show that this plat, being an ancient one, or a copy of the original, which is lost, or cannot be found, is evidence, he referred to *Butler vs Craig*, 2 *Harr. & M. Hen.* 219. *Smith's Lessee vs Steele*, 1 *Harr. & M. Hen.* 419. *Scott's Lessee vs Ollabaugh*, 3 *Harr. & M. Hen.* 511. *Ridgely's Lessee vs Ogle & Leonard*, 4 *Harr. & M. Hen.* 126, (note.) *Atkins vs Hatton*, *Anstr.* 387. *Miller vs Foster*, *Ibid* 607. *Peake's Evid* 90; and *Bull. N. P.* 248. If the title of the complainants has not been sufficiently established, yet the de-

defendants' testator made the contract with a full knowledge of the situation of the property, and of the claims set up to it; he is therefore bound by it, and it may be enforced. *Gibbons vs Caunt*, 4 Ves. 849. *Stapleton vs Stapleton*, 1 Atk. 1. *Cann vs Cann*, 1 P. Wms. 728. The judgment in the action at law is conclusive that the complainants could not recover the rents due under the lease. The lease, though recorded in the records of the general court, is not a valid one. By the act of June 1777, ch. 3, it is said, the lease need not be acknowledged; but by the act of 1715, ch. 47, all transfers of real estate, for above seven years, are required to be acknowledged, so as to admit them to record. A corporation may do a number of acts under their common seal; but they must acknowledge deeds, which they can do by letter of attorney.

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Mayer, on the same side. The testator of the defendants acquired not only the title of *Mackubin*, but also that of the complainants, and having these titles, and the possession of the property, he has attempted to shield himself under some imaginary defects. Standing, as he did, he was bound by his contract, which he entered into with full knowledge of the facts. He has not shown that his title is superior to that of the complainants, and it was at least incumbent on him to do that. A tenant cannot dispute the title of his landlord. *Co. Litt.* 47. The owner of ground may take a lease from a stranger, and he is bound by such lease. *Ibid.* Where a purchaser takes possession of the estate, it is in most cases a waiver of the title of the vendor. *Sudg.* 9. *Calcraft vs. Roebuck*, 1 Ves. jr. 226. *Fludyer vs. Cocker*, 12 Ves. 27. *Colton vs. Wilson*, 3 P. Wms. 195; and *White vs. Foljambe*, 11 Ves. 348. The court will not disturb contracts entered into by the parties with a full knowledge of their respective rights. *2 Pow. on Contr.* 213. *Pullen vs. Ready*, 2 Atk. 592. Here the complainants cannot be restored to the situation they were in before the contract was made. The defendants cannot say that the lease has been regularly recorded, and is valid. Nor can they say the complainants' remedy is at law. They are bound by the admissions of their testator in the suit at law. Where there are difficulties to a recovery at law, the party may be relieved in equity. If the complainants had proceeded *de novo* at law, the defen-

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dants' testator, says in his answer, that he would have brought them into chancery. The complainants did right, therefore, to come directly into chancery, since the defendant would himself have eventually brought them there. The lease is not a valid deed, if it did not need acknowledgment, there being no place designated by law where such an instrument should be recorded. It having been recorded where it was, is the same as if it had not been recorded at all. The clerk of the general court had no authority to record a deed which had not been acknowledged. The act of June 1777, *ch. 3*, did not mean to make any alteration as to the manner of acknowledging deeds. It empowers the corporation to transfer their property under their common seal, but does not say the deed need not be acknowledged. Defective deeds may be perfected on application to chancery. *Hunsden vs. Cheney*, 2 *Vern.* 150. *Finch vs. Winchelsea*, 1 *P. Wms.* 279. The complainants having rightfully come into court, the court will go on and give relief for the rent, although it be competent for a court of law to do so. On an application for discovery, the court will proceed with the case and grant relief. *Francis's Maxims*, 42. A court of equity may decree for mesne profits. *Coventry vs. Hall*, 2 *Chan. Ca.* 134. *Dormer vs. Fortescue*, 3 *Atk.* 129, 130. *Campbell vs. French*, 2 *Cox's Rep.* 366. *Pultney vs. Warren*, 6 *Ves.* 89. *Curtis vs. Curtis*, 2 *Bro. Chan. Ca.* 620. *Weymouth vs. Boyer*, 1 *Ves. jr.* 417. *Coventry vs. Thinn*, 2 *Chan. Ca.* 71, 72. *Thorndike vs. Collington*, 1 *Chan. Ca.* 79. *Collett vs. Jacques*, *Ibid* 120. *Underwood vs. Staney*, *Ibid* 78. *Ratcliffe vs. Graves*, 1 *Vern.* 196. *Livingston vs. Livingston*, 4 *Johns. Chan. Rep.* 217; and *Langley vs. Brown*, 2 *Atk.* 198. If the complainants might have succeeded in ejectment at law, they could nevertheless apply to equity for a specific performance. An action for use and occupation could not be brought at law, for the contract here was under seal. But if it could, then an action of debt might have been brought; and where debt is brought for use and occupation, the act of limitations will not bar a recovery; at all events, our statute of limitations does not bar an action of covenant for rent, and this proceeding in equity, the court will consider upon the same footing with such an action, in order to preclude the plea of limitations here set up. A

plea of that kind is not favoured either at law or in equity. *Wilkins vs. Wingate*, 6. T. R. 62. This then is similar to such an action. *Collett vs. Jacques*, 1 Cha. Ca. 120. As a general principle, interest is not recoverable for rent, but that is where it is owing to the negligence of the landlord. Where the default is on the part of the tenant, interest is recovered. 6 *Binney's Rep.* 159. Interest is always recoverable, unless it is inequitable to ask it. *Clark vs. Barlow*, 4 *Johns. Rep.* 183.

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Jones, also for the Appellees. Here is a consummate contract—a lease executed with covenants—Possession and holding by the lessee for a number of years—Payment of rents for several years, and refusal to pay further. He thereby compelled a suit to be brought at law, in which he defended himself upon a technical objection, not upon the ground that no rent was due. There was a final judgment on a formal objection against the complainants' recovery, and recourse is had to equity to enforce the contract. The defence, among others, is the want of title to that property, which the lessee had enjoyed without interruption. The bill sets out a lease for 99 years. This is not denied in the answer, nor is its execution denied. The burthen of impeaching the title rests on the defendant. He has not done so. He charges a defect of title, and he must show it, and his answer is not sufficient for that purpose. This is similar to debt on bond, where the defence set up is duress, which throws the burthen of proof on the defendant. The complainants were not bound to show title; but they have deduced their title by proof, which the defendant has not disproved. Now he alleges that the title is at least doubtful. There can be no better title for a corporation in a city than that shown by the evidence before the court. The act of June 1777, *ch.* 3. recognizes this property as being under the control of the corporation, and whether they have a fee simple in it or not, is of no sort of consequence. Upon the ordinary doctrine of presumption, the title will be deemed to be sufficient. Here was a possession in the corporation for more than a century, and the property used for public purposes; the defendant, for 35 years, enjoying undisturbed possession under the corporation. This is *prima facie*, if not conclusive evidence, of title in the corporation. Shall such a right as this be uprooted now, and by him who

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had no occasion to do so, and from whom no such objection should come? Until this bill was filed, nothing was said about the title; nothing was said at law about the defect of title. To defeat such a title there must be the strongest possible evidence of its defect. Suppose a defect of title is established, and a better paramount title is set up by the defendant, is such a defence allowable in him? Can he take advantage of the defect of title? This is not an ordinary case between vendor and vendee in relation to a defective title. If a vendee makes a contract, with a knowledge of a defect of title, he cannot afterwards dispute the vendor's want of title—He took it for better or for worse; it amounts to a waiver, and binds the vendee. *Sugd. 1, 2.* If the vendee could have ascertained the nature of the title, he is bound by the contract. *Ibid 9.* As to the objection between the quality and quantity of the estate sold. *Ibid 192, 195, 197. 2 Com. Dig. tit. Chancery, (2 C 1.)* If a purchaser enters on part of the premises, he is compelled to go on and complete the purchase. In *Liddat vs. Weston, 2 Atk. 19,* there was an apparent defect of title, and it was not probable that the superior title would ever be enforced—That is similar to the case before the court, where an outstanding title is set up. In *Kingsley vs. Young, 17 Ves. 469,* there was no legal title, but only an authority to sell. It was presumed the purchaser took the estate with full knowledge; this is a strong case in point. In *Thomas vs. Powell, 2 Cox, 394,* the purchaser accepted the title. *Fane vs Spencer, 2 Madd. Rep, 438.* The mere circumstance of the nonproduction of a good title on the part of the vendor, will not prevent the vendee being bound to go on to show title in another to absolve himself from the contract. The defendant, by his own showing, cannot take advantage of the title if it be a defective one. He admits he took the lease to fortify his title, which was a defective one. It amounts to a compromise; and take it in the strongest terms, he is shut out from ever disputing that title he contracted for. *Cann vs. Cann, 1 P. Wms. 723. Stapleton vs Stapleton, 1 Atk. 10. 2 Com. Dig. tit. Chancery, (2 C 1.) Goilmere vs. Batteson, 1 Vern. 48.* Here the defendant wishes to keep the rents and profits, and the property too. Shall he be in a better situation than other vendees? *Fludyer vs Cocker, 12 Ves. 27.* If possession is taken and the contract remains executory, the vendee

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may be relieved, if the title is defective, but he must give up the property. *Gibson vs Clarke*, 1 Ves. & Beames, 500. An objection has been taken to the jurisdiction of the court of chancery, on the ground that remedy may be had at law. The act of June 1777, *ch. 3*, did not point out where the deed should be recorded. But admit the deed to be properly recorded; yet in the suit at law the defendant said the deed was not recorded any where, except in the mayor's court; and on that admission the court at law decided. That decision was either right or wrong. But the chancellor could not look into the decision to see whether it be right or wrong; it was a decision conclusive that relief could not be had at law, so as to let in the jurisdiction of chancery. A new fact has been since disclosed, to show the decision should not have been what it was. Who was in possession of this new fact? The defendant; and he now wishes to take advantage of the false statement submitted to the court at law to defeat the claim in equity. Having defeated the complainants at law, by a falsehood, the defendant now sets up the truth by disclosing the fact, so as to turn the complainants out of a court of equity. If it shall appear that the complainants have remedy at law, shall they be sent back to that tribunal, and by doing so be defeated of all the rent, but for three years preceding the suit. This will be such glaring injustice as this court will not sanction. It has been said that the complainants might have sued for use and occupation. If they had sued for use and occupation, then the defendant would set up the lease. If he had not, no more than three years rent could be recovered, besides being subject to a plea of *nil habuit in tenementis*; and although the complainants may, in part, recover at law, they are not bound to go there, when full and complete remedy may be had in equity. The act of limitations is pleaded. To what is it pleaded? It cannot be pleaded in this suit for enforcing a contract, and claiming rents as a consequence thereof; the complainants by fraud, were defeated at law; will limitations bar in such a case? But it is said the bill sets out a good title, when it was a defective one. There is no authority to defeat the bill, and to show that it does not set out all that is material, and for which they can claim full and complete remedy. Admit the complainants cannot claim relief different from that they ask for by their bill; yet if the particu-

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lar relief asked for is not inconsistent with the general relief prayed, it may granted.

Taney, in reply. The complainants cannot allege fraud, unless it is charged in the bill. The defendant is charged with having concealed a record. How could he conceal a record? The records of the general court were open to the inspection of all persons. The defendant was not bound to let the complainants know that the deed was recorded. He was not bound to aid them with information of their title. A case stated, like a bill of exceptions, is nothing more than what is alleged as proved by both parties. Neither party is bound to point out any defect in the title or statement of the other. The deed was not a private paper in the possession of the defendant only. The agreement to the case, stated by the defendant, did not estop him from denying any fact alleged in the case stated. The lease was decided to be defective. To estop the defendant, it must be a complete instrument. An agreement never operates by way of estoppel. It is a contradiction to say, a paper which is void operates as an estoppel. The chancellor decreed that the executors may claim a lease, but he would not compel them to take one. But the complainants allege that this is erroneous, and that this court may correct that error. They have not appealed, and cannot claim a reversal on that ground. By not appealing, they have acquiesced in the decree. One question is, whether a complainant is bound to prove a title in order to entitle him to enforce a contract where the issue before the court was whether he had a title or not? Here the complainants aver a seisin in the property; this is denied, and it must be proved. Upon this rests the whole equity of the case. Will this court enforce a contract unless a title in the party is made appear? A lease is a permission to the tenant to enjoy the property, and is an equivalent for the rent. Suppose they had not alleged a seisin, the consideration would have been out of the bill, and there could be no pretence for relief. They allege a seisin, and attempt to prove a compromise—not the consideration alleged in the bill. This might be a good consideration, but it must be alleged and proved. But you cannot prove a fact not put in issue. The *allegata* and *probata* must agree. In *Cooper's Plead.* 6, 7, it is said, the party must put in issue in the

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bill what is intended to be proved; and *Clarke vs. Turton*, 11 *Ves.* 240, is cited, where, as the fact was not in issue, the deposition was not permitted to be read. Suppose the compromise had been proved, what is the ground of equity claimed? Not on the ground of title. The corporation were bound to prove a title; it is the only equity in the bill, upon the basis of which they can recover—It is on their part to prove their title; they are bound to prove their case. The defendant was not bound to prove any title, until the complainants had proved their title. He denied the title of the complainants, and alleged a different one. He need not prove a title in any one, where the complainants show none. The answer of the defendant is proof in the cause that the complainants had no title, it being responsive to the bill. What is the title of the corporation? They show none from the grantee to them; but they claim under certain acts of assembly. Instead of proving a title in themselves, they have showed one out of themselves. The whole property in controversy is covered by the act of assembly, which reserved it for public purposes, (not for the benefit of the corporation.) The first act, 1719, *ch.* 5, vested the property in *Robert Johnson*, with a proviso. The grant emanates from the province, and the corporation were vested with power to re-enter, if the ground rent of 5*s.* was not paid. There is no power given to the corporation to rent, lease, &c. The government had appropriated the ground to public purposes, and they vested it in *Johnson*. If it had been in the corporation, they could have leased or sold to *Johnson*; but they were constituted the agents of the public, to see that *Johnson* complied. By the act of 1725, *ch.* 26, the same title is vested in *Gordon*, in the same manner and upon the same conditions, *Johnson* not having complied, &c. By the act of 1753, the same property is vested in *Middleton* on the same conditions, &c. These acts all assert the property to be in the province. The corporation, by accepting the ground rent of 5*s.* acknowledge the right of the public. The act of June 1777, *ch.* 3, gives power to the corporation to sell or lease the property, under their common seal; so much of the money and rent reserved, to be applied to the purchase of one or more places for building ships, and the overplus to be applied to the benefit of the city. Does the act vest a fee in the corporation? They are the con-

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stituted agents of the public. What was given to the corporation was the overplus of the money. It is not shown that any place or places were purchased for ship-building. It appears that the corporation have received a large sum of money, and appropriated it to their own use. How can they claim of the defendant for violating his contract, when they have violated the sacred trust reposed in them by the public? Under the authority of the act of 1777, they make the lease; and so far from recovering from the defendant, they owe a large sum of money to the state. By the *third section* of the act of 1777, it may seem that the property to be purchased was to belong to the city. Admit this, they did not purchase, but if they had, it related only to the property to be purchased; and they would only hold for the benefit of the public. But no sort of title was vested in them to be sold or leased by them. They were solely trustees of the state. This being for the benefit of the state, the state should be a party in this cause. But putting aside the want of parties: Has any title been proved in the corporation? Their long possession, or the possession of any under them, cannot bar the right of the state. This is assuming that they leased as owners; but that was not the fact, they leased as agents, and the defendant held under the state, and under the state's title. He held under the lease of the corporation, but under the title of the state. The corporation do not profess to lease under their own title, but only to act as the representatives of the state. The possession of the defendant, if under the lease, was a possession under the title of the state, and is evidence of title out of the corporation. What would be the effect if the state was a party, is a different question. But what is the proof of the possession, as against the state? The answer of the defendant is responsive to the bill, and it says he agreed to purchase to avoid dispute, but he was then in possession, and though it is admitted in the case stated, that he did enter under the lease, yet a case stated is no evidence against either party. A bill or answer in chancery is no evidence, unless sworn to. A case stated is merely to bring a question of law before the court. It is similar to a demurrer; and it has never been supposed that a demurrer, which admits all the facts, would be evidence against the party demurring. It cannot be distinguished from a bill in chancery, which is con-

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sidered a mere statement of counsel. To show that the ship carpenters lot includes the whole of the ground in controversy, the plat is referred to; and it is admitted that ancient surveys are evidence. The plat offered by the defendant is *the original plot* made out by *Stoddert*, the surveyor appointed under the act 1718, *ch. 19*. The plat offered by the complainants is stated to be *a copy*. Upon the doctrine of title, how far a vendor is bound to accept it, and how far a disputed title may be enforced in a court of equity, it may be said that when a vendee, after having been in possession, comes into a court of equity to be relieved against the contract, his situation is very different from that of a vendor, who comes in to enforce it. Here the vendors come in, and claim the aid of the court, to enforce a contract against the vendee. Whose fault is it? Was it not the duty of the vendor to see that his deed was a good one. From 1801 to 1812, there has been an acquiescence by the corporation in the defendant's refusal to pay rent. Then they went into a court of law; and claiming under a defective lease, because they would not resort to the record for proof, a judgment at law was had against them. The rule between vendor and vendee is laid down in *Sugden* 210, and it is, that a vendee is not compelled to accept a defective title. There is no evidence that the defendant took possession under the lease from the corporation. In most of the cases cited, the vendees had taken possession under their purchases, and then went into equity to be released from their contracts. In *Kingsley vs Young*, 17 *Ves.* 468, the principle is not at war with that laid down in *Sugden*, 210. It does not stand upon the ground of a disputed title. In the purchase of a disputed title, the party sells the right he has. But between lessor and lessee, it is for permission of the lessee to enjoy, and is the consideration by which he is to enjoy. This is different from the case of the vendor and vendee. A vendee gets the right, but not permission to enjoy. In *White vs Foljambe*, 11 *Ves.* 343, 344, the lessee was not bound to take a lease of a doubtful title. There is a wide difference between forcing the lessee to take a lease, and relieving a lessor, who took possession. Here the lessors come to enforce a contract to take a lease of a doubtful title. But even were there no difference, yet here the lessee was not in possession under the lease, or the contract for the

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lease. The defendant has not denied that the lease was not recorded, it is therefore not in issue whether it was recorded or not. But it must be taken as not recorded. The complainants had remedy at law. They might have brought their action for use and occupation. But it has been said, that in such an action the defendant might plead *nil habuit in tenementis*. This is not so. A tenant cannot contest the plaintiff's title. 6 *Bac. Ab.* 44. Here the complainants were guilty of laches before they brought their suit at law, and before they came into equity. The loss is by their own negligence. The accumulation of rent is by their fault. That which would bar at law, will bar in equity. The act of limitations is a complete bar.

DECREE AFFIRMED.

JUNE (E. S.)

WHITTINGTON vs. THE FARMERS BANK OF, &c.

It is no objection to a protest of a promissory note, that it is stated to have been made at the request of *The Farmers Bank of, &c.* instead of *The President, &c.* the corporate name.

The protest of a promissory note is not evidence of it self in chief of the fact of a demand on the drawer. If the notary public was dead, the case would be governed by different considerations.

APPEAL from *Worcester* county court. In the report of this case in 5 *Harr. & Johns.* 499, a mistake has occurred in a part of the court's opinion delivered on the *third* bill of exceptions, which it is deemed proper to correct. In that bill of exceptions it is stated, that the plaintiffs below, (the appellees,) having read in evidence the promissory note, on which the action was instituted, offered in evidence a protest of the note, made by a notary public. To which the defendant objected, on the ground that the protest appeared to have been made at the request of *The Farmers Bank of Somerset and Worcester*, instead of *The President and Directors of the Farmers Bank of Somerset and Worcester*, (the corporate name of the plaintiffs, and by which name they brought their action.) This objection the court below overruled, and the defendant excepted, &c. The following is the corrected opinion of this court as delivered by

DORSEY, J. This court concur with the court below in the opinions expressed by them in the 1st, 2d, 4th, &c. bills of exceptions; but they think, that though the court did right in not sustaining the objection made by the appellant to the form of the protest, set out in the *third* bill of exceptions, there was error in permitting it to go to the jury. We hold it to be clear, that the protest of a promissory note is

not evidence of itself in chief of the fact of demand; and as there is no parol proof of a demand set forth in the exception, it is difficult to conceive that the protest was produced for any other purpose than proving a demand on the drawer. If the notary public had been dead, and this fact appeared by the record, the case would have been governed by different considerations. We are of opinion that the judgment of the court below must be reversed.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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the defendant, with his express directions, rode his mare several miles through different farms; and turned her out, whereby he lost her services for many days; which the defendant attempted to justify, by offering to show that the mare was trespassing upon his close—*It was held*, that the defendant had the right to arrest the mischief to his close, by removing the trespassing animal to the exterior limits of it, but further than this he could not go. *Knott v Digges*, 230

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 5. Where a law is of doubtful construction, that interpretation should be given it, so far as it can be done, which is pregnant with the least mischief *Ib.* 381
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1. An agent is not answerable for negligence, or inattention, where a bill of exchange was placed in his hands for collection, and he undertook to collect it according to the usages and customs of merchants and banks, by sending it to a bank for collection, and owing to the bill having been demanded and protested for nonpayment on the fourth day after it fell due, the endorser was discharged, and the amount of the bill thereby lost. *Jackson v The Union Bank of Maryland*, 146
2. An agreement, that "I have this 9th of January 1817, hired of *G. P.* the following slaves, for the use of *R. K.* to give \$80 as wages for each of the slaves, and to furnish them with all necessary clothing and food," (then stating the names of the slaves,) and signed "*P. K.*"—Held not to bind *P. K.* personally. *Key's Ex'r. v Parnham*, 418

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AGREEMENT.

1. The court of chancery, in the exercise of its moral jurisdiction will upon the proof of fraud, mistake or surprise, raise an equity by which the written agreement of the parties shall be rectified. *Wesley, et. al. v Thomas, et ux.* 24
2. — It is essential, however, that such fraud, mistake or surprise, should be alleged in the bill as the ground and object of the parol proof. *Ib.*
3. Where there is a subsisting special agreement, a party to it cannot recover on general counts; he must declare on the special agreement, and that being the gist of the action, it must be stated in the declaration. *Watkins v Hodges & Lansdale,* 38
4. A declaration on a special agreement must state all the essential parts of the agreement. *Ib.*
5. Where an agreement formed an entire contract, to enable the plaintiff to recover on it, he must prove a performance, or tender to perform every thing required by it on his part to be performed. *Ib.*
6. If a contract be rescinded by the parties after its part performance by the plaintiff, he may recover for the part performance on a general count. *Ib.*
7. A subsequent parol agreement to postpone the delivery of articles under a contract without seal, is not a waiver of the contract, but only an enlargement of the time for its performance. *Ib.*
8. If there is a special agreement between the parties, open and unrescinded, it is indispensably necessary that the plaintiff should declare upon it; and he must state his case as it is. *Speake v Sheppard,* 81
9. Where the contract proved in evidence varies from the contract declared upon, the plaintiff cannot recover on it; nor can he recover on a *quantum meruit*; because there was a special agreement. *Ib.*
10. — But if he decides upon a special contract, and fails to prove it, but proves an agreement, and a performance of it, it raises a duty for which a general *indebitatus assumpsit* will lie. *Ib.*
11. On the defendant's prayer to direct the jury, that if they believed that there was an express contract between the plaintiff and defendant for

building a house, by which the defendant was to pay a specified sum of money, then the jury could not imply a new contract, which was to destroy the original, or to be made the foundation of the plaintiff's claim. The county court refused to give the direction; but directed the jury, that if they found, from the evidence, that any alterations or additions to the original plan of the building were made with the knowledge of the defendant, for which he paid, that then they might find from that fact, that the original contract was rescinded; and that if it was so rescinded, the plaintiff was entitled to recover for the other additions or alterations in the building, which were made with the knowledge of the defendant, and not objected to by him at the time. On appeal, reversed. *Berry v Thompson,* 89

12. Where P contracted with N for the sale of certain slaves, and N was to take them into his possession, and pay for them at an ensuing day, but the property of P was to continue until they were paid for, and a part of the price agreed upon was paid to P.—*Held,* that P did not, at the time of the contract, part with his interest in the slaves; that the payment of the whole of the stipulated price was a condition precedent, on the performance of which alone, and not before, the title could vest in N. That the part payment was not such a performance as could of itself have the effect to divest P of his property, but that the title remained in him notwithstanding any indulgencies which he may have extended to N; and although he might permit the possession to remain in N, he was under no obligation to stand by and suffer N to transfer them to another person, and thereby incur the risk of losing them altogether, but had a right to assert his claim whenever he saw them passing into other hands, on the ground that the title by the terms of the original contract was never out of him. *Corse v Patterson,* 153

13. A *fi. fa.* on a judgment obtained by B against L, was placed in the hands of M, a sheriff, and by him laid upon the land of L, who, at the sale, perceiving that it would not sell for its real value, entered into a verbal agreement with W that he should bid it off for and upon L's account, to enable him thereby to gain time to raise the money. W did bid off the land at less than its value, but conceiving the

design of turning the purchase to his advantage; entered into a fraudulent agreement with M, to retain it for their mutual benefit, and refused to relinquish it to L, who had made an arrangement with B for payment of the debt. For this violation of his agreement, L brought an action on the case, on the verbal agreement against W, who rested his defence on the statute of frauds—*Held*, that the action, not being founded on deceit, misrepresentation or fraud, is within the statute of frauds. *Lamborn v Watson*, 252

14. — *Held*, also in an action on the case against M, the sheriff, that the agreement was within the statute of frauds, and that the plaintiff could not recover. *Lamborn v Moore*, 422

15. Courts of law, as well as of equity, have cognizance of fraud, but courts of law relieve against it negatively; by inquiring into the circumstances, and not permitting plaintiffs to recover in actions brought on deeds or contracts fraudulently obtained, and thus virtually annulling such deeds or contracts as against the fraudulent parties. But they cannot entertain actions upon verbal contracts within the statute, on the ground of fraud in refusing to perform them. *Lamborn v Watson*, 252

16. An agreement between the parties to arbitrate a dispute between them, does not divest courts of justice of their jurisdiction. *Allegre v The Maryland Insurance Company*, 408

17. A written agreement cannot be explained by a subsequent letter of one of the parties. *Key's Ex'r. v Parnham*, 418

18. Where, upon the face of an agreement, one of the contracting parties appears plainly to be acting as the agent of another, the stipulations of the agreement operate solely to bind the principal, unless it manifestly appears that the agent intended to super-add or substitute his own responsibility for that of his principal. *Ib.*

19. An agreement, that "I have this 9th of January 1817, hired of G. P. the following slaves, for the use of R. K. H. to give \$80 as wages for each of the slaves, and to furnish them with all necessary clothing and food," (then stating the names of the slaves,) and signed "P. K."—*Held*, not to bind P. K. personally. *Ib.*

See Alimony 6.

— Contract

— Husband and Wife 10.

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ALIMONY.

1. Courts of equity in this state have jurisdiction in cases of Alimony. *Wallingsford v Wallingsford*, 483

2. Alimony is a maintenance for the wife, where the husband refuses to give it, or by his improper conduct forces her to separate from him. It is not a portion of his real estate to be assigned to her in fee, and, subjected to be sold by her, but a provision for her support, to continue during their joint lives, or so long as they live separate, *Ib.*

3. Before a decree for alimony can be had, the court must know, either from the admissions of the parties, or from other evidence, that the husband refuses to maintain his wife; or has forced her to leave him; and also the value of his estate. *Ib.*

4. On a bill for alimony the court cannot decree a sale of any part of the husband's estate. *Ib.*

5. Whether or not articles of agreement immediately between husband and wife, for her separate maintenance, will be enforced? It is clear, however, that she can make no such agreement by attorney. *Ib.*

6. On a petition by the wife for alimony, and the husband's appearing, and by his answer stating "that he was willing to allow her a maintenance, to let her have \$2000; the property she had before received from him to be valued by J M and J H, as a part of it; the balance of said \$2000 to be taken by her in such of his other property as she might choose at a valuation by J M and J H, and the balance in money, or notes made payable to them, at such periods as they should determine to be reasonable, and to be held and applied by them to her separate use," accompanied with a written agreement, signed by the husband and by the wife's attorney, that the court should decree according to the proposal in the husband's answer.—*Held*, 1. That no decree could pass to enforce such an agreement. 2. If it could, that a decree could not be had for a sale of any part of the husband's estate. 3. That if J M or J H declined to make the valuation proposed by the answer, the court had no authority to substitute, without the husband's consent, any other person to make such valuation; and, 4. That it was not a case proper for a decree for alimony. *Ib.*

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APPEAL.

1. An appeal will not lie from an interlocutory decree of the court of chancery, by which no question of right between the parties is decided. *Snowden, et al. v Dorsey, et al.* 114

2. The refusal of the county court to strike out a judgment by default, and suffer the defendant to plead, is not a subject of appeal, and cannot be revised by the court of appeals. *Jackson v The Union Bank of Maryland,* 151, (note)

3. S, obtained a judgment in the county court against D, which was removed to and affirmed in the court of appeals, D afterwards obtained an injunction to stay proceedings thereon, which was continued until final hearing, when the chancellor decreed, that unless D should on or before, &c. pay to S a certain sum of money, with interest, &c. the injunction should be dissolved. D appealed from that decree, and entered into an appeal bond, which was not, in point of form, agreeable to the act of 1713, ch. 4, but was approved by the chancellor. On motion of S for a rule on D, to show cause why an execution should not issue on the judgment of affirmation, notwithstanding the appeal from the decree of the chancellor, and the approval of the appeal bond—Rule refused. *Smith v Dorsey,* 261

4. On an appeal from the county court, relative to a matter of practice, if there are any rules of practice in that court, that justify the procedure in the case, they ought to appear in the record. *Benson v Davis's Adm'r.* 272

5. An appeal does not lie from a mere practical order of the court of chancery, which is only preparatory to a final hearing, and by which the rights

of the parties are not effected. *Thompson v McKim et al.* 302

6. A decretal order, passed upon the issue in the cause, in relation to the subject matter in controversy, and which settles the question of right between parties, may be appealed from, *Ib.*

7. Whether an appeal lies in any particular case, is a question to be decided by the appellate court alone. *Ib.*

8. Where a bill in chancery states that the defendant received the money in dispute for the use of the complainants, from the debtor of the complainants, under a contract between the debtor and the defendant, and the defendant in his answer admits the contract, but denies that the construction of it is, that he was to hold the amount received under it for the complainants, but asserts that it was so received for his own use, and the chancellor decides that issue against the defendant, and passes an order directing him to bring the money into court, he may appeal from that order. *Ib.*

9. A writ of error is mandatory, and leaves nothing to the discretion of the subordinate tribunal. *Ib.*

10. Appeals in this state are on the same footing with writs of error, and are equally mandatory upon the court from whose judgments or decrees they are taken. *Ib.*

11. Under the act of 1713, ch. 4, parties are entitled to an appeal as a matter of right. An appeal is properly before the appellate court, where it has been demanded in the way provided for by that act, and a transcript of the record of the proceedings of the inferior court, under the seal of the clerk of such court, is filed in the appellate court. *Ib.*

12. The provisions of the act of 1713, ch. 4, so far as relates to the manner of prosecuting appeals, have been extended to appeals from chancery, by the act of 1729, ch. 3. *Ib.*

13. The 2d section of the act of 1713, ch. 4, does not apply to appeals from chancery. *Ib.*

14. Appeals from the court of chancery in England, to the House of Lords, are had without consulting the chancellor. *Ib.*

15. The court of chancery of this state is governed by the principles of the English court of chancery, so far as the same are applicable. *Ib.*

16. An appeal from the court of chancery in this state does not, *per se*, sus-

pend proceedings on the decree appealed from. *Ib.*

17. — Pending such an appeal, the chancellor, if applied to for that purpose, may order the proceedings to be suspended on such terms as the peculiar circumstances of the case may be found to require; or, a special order to the same effect may be passed by the appellate court. *Ib.*

18. The power of suspending the proceedings in chancery in *England*, pending an appeal, by the House of Lords, is not an arbitrarily assumed power, but incidental to that body as an appellate tribunal. *Ib.*

19. — The same power, in regard to decrees in chancery in this state, pending an appeal to the court of appeals, is incidental to that court. *Ib.*

20. — The existence of such a power is necessary for the beneficial exercise of appellate jurisdiction. *Ib.*

21. Where it appears, that if the order or decree appealed from should be reversed by the court of appeals, the enforcement of such order or decree pending the appeal would produce irreparable injury to the appellant, an order to suspend proceedings will be passed by that court, on such terms as will not be prejudicial to the appellee. *Ib.*

22. — Where, under the particular circumstances of the case such an order was passed by the court of appeals. The form of the order set out. *Ib.*

23. Where a decree states that the cause was *ready for hearing*, it will be presumed by the appellate court that it was, although it does not appear to have been set down for hearing. *Rigden v Martin*, 403

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— Court of Appeals.

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APPEAL BOND.

1. The true construction of the words "*prosecute with effect*" in an appeal bond, is that the appellant shall prosecute the appeal to a successful termination, or a reversal of the judgment. *Karthaus v Owings*, 134

2. Where a judgment in an action of replevin for the return of the goods shall be affirmed on appeal, the value of the goods, (if they have not been restored,) and the costs of suit, would seem to be the true standard by which the damages of the appellee should be measured, in a suit brought on the appeal bond. *Ib.*

3. — In an action on such an appeal bond, the plaintiff should reply to the plea of performance, that the defendant did not prosecute his appeal with effect, whereby he had sustained damages to such an amount. *Ib.*

See Appeal 3.

APPLICATION OF PAYMENTS.

See Rent 1.

APPRENTICE.

1. M was duly bound an apprentice to J M in the city of *Baltimore*, to learn the trade of a *weaver*. He afterwards applied to the court of oyer and terminer, &c. for *Baltimore* county, with the consent of J M, to be released from his indentures, where he was released; and with his own consent, and the consent of J R, that court passed this order — "It is adjudged and ordered, that M, be and he is hereby bound to J R, until he is 21 years of age, to learn the trade of a saddler," &c. In an action of *covenant* by M against J R, for a breach of this order — *Held*, that M was not entitled to recover. *Mass v Rogers*, 492

2. Whether or not the court of oyer and terminer, &c. had authority to release an apprentice from his indentures, with the consent of the master and apprentice; and bind him to a different trade? *Quere.* *Ib.*

ARBITRATORS & ARBITRATION.

1. An agreement to arbitrate does not divest courts of justice of their jurisdiction. *Allegre v The Maryland Insurance Company*, 408
See Award 8, 9, 11, 12.

ASSESSMENT OF DAMAGES.

See Judgment 1.

ASSETS.

See Bill of Sale 2.

ASSIGNEE & ASSIGNOR.

See Assumpsit 1.

— Privity of Contract.

ASSIGNMENT.

See Extinguishment 1.

— Parol Evidence 2.

ASSUMPSIT.

1. In a charter creating a corporation, subscriptions were authorised for raising the capital stock, to be paid by instalments, and when a certain amount was subscribed, the proprietors of shares, either as subscribers,

- or assignees of such subscribers, were created a body politic. *H P*, who was a subscriber, assigned his stock to *W B*, before the whole of the instalments were paid.—*Held*, that there was such a privity between the corporation and *W B*, as enabled them to sustain an action of *assumpsit* against him for the amount of the instalments which had not been paid. *Bend v The Susquehanna Bridge & Bank Co.* 128
2. If a debtor gives his promissory note on account of a pre-existing simple contract debt, the note does not merge or extinguish such debt; but the creditor, on nonpayment of the note, may resort to the original contract. *The Patapsco Insurance Company v Smith, et al.* 166
3. If a party, at the time of contracting a debt, assigns the note of a third person to the vendor, such note does not extinguish the original contract, unless it was received as payment or satisfaction of such contract. *Ib.*
4. *A* applies to *B* for insurance for himself, and others, on a cargo of goods, and the application is accepted by *B*, the policy executed, and *A*, with *P* his surety, gives to *B* their promissory note for the payment of the premium. *A*, at the time he applied for insurance, did not disclose, nor was he requested to do so, who the persons were for whose benefit, as well as his own, the insurance was applied for; nor were the parties interested in the insurance known as such to *B* until some time after the policy had been executed. The note, when it became due, was not paid. No notice was given to *C* and *D*, who were the other persons interested in the insurance, of the nonpayment of the premium, until the day the note became due. Before that time *C* and *D* paid to *A* their respective proportions of the premium without the knowledge or privity of *B*.—*Held*, in an action of *assumpsit* for the premium, brought by *B* against *A*, *C* and *D*, that the note given by *A* would not *per se* be sufficient to extinguish the simple contract debt, if under the circumstances of the case the law would imply a promise on their part to pay the premium to *B*. But as *B* was satisfied with the responsibility of *A*, and his surety, and did not intend to look to *C* and *D*, and as it was evident that the insurance was effected by *A*, as the agent of *C* and *D*, and not as co-partner, *B* could not recover the amount of the premium in such action. *Ib.*
5. If a contract is made for the payment of tobacco, which is not complied with, the plaintiff, in *assumpsit* on that contract, may recover the value of the tobacco in money. *Lyles v Lyles's Ex'rs.* 273
6. Whether or not since the act of 1812, *ch* 135, *s* 3, a judgment can be entered for tobacco? *Quere.* *Ib.*
7. Where an act of assembly authorises the collection of taxes imposed by such act, by distress or action of debt; or where an act authorises the tax, but gives no remedy, in either case an action of *assumpsit* will lie, on the principle, that where the law gives a claim to one against another, it raises an implied *assumpsit* on the legal obligation to pay. *The Mayor, &c. of Baltimore v Howard,* 383
8. The giving a remedy by distress or action of debt, is cumulative only, and does not take away the action arising by implication on the legal obligation to pay a claim created by law. *Ib.*
9. In an action of *assumpsit* against a ship owner, for the loss of goods which he had engaged to transport for freight, it is not necessary to aver in the declaration, the payment of the freight, or the tender of it. *Ferguson v Cappeau's adm'rs.* 394.
10. — If the bill of lading contains an exception "of the dangers of the seas," such exception must be stated in the declaration. *Ib.*
11. Every proviso in a contract, which goes to discharge the liability under it entirely, must be stated in the declaration; otherwise if it only goes to diminish the liability. *Ib.*
- See Agreement

ATTACHMENT.

1. The circuit court of the *United States* has jurisdiction and authority to award an attachment under the act of 1715, *ch* 40, on the return of two *non ests* to writs of *capias ad respondendum*, sued out in the name of the *United States*, against the property of a defendant, whether he be in *fact* a resident of the state or not. *Barney v Patterson's Lessee,* 182
2. An attachment will lie against the property of foreigners, whether they have been residents within the state or not. *Ibid* and 191, (*note.*)
3. An attachment under the act of 1715, *ch* 40, may be awarded against the *lands and tenements*, as well as the goods, &c. of the defendant. *Ib* 182
4. Under the construction given to the statute of 5 *Geo. II*, *ch* 7, lands be-

- came liable to be taken and sold by *fiieri facias*, in the same manner as goods and chattels, and are subject to attachment. *Ib.*
5. As proof of the cause of action to warrant the issuing an attachment in the name of the *United States*, a bill of exchange, drawn by the defendant, and payable to J C, and by him endorsed to T T, the treasurer of the *U. S.* as their agent, and to and for their use, and duly protested for non-acceptance and for nonpayment, was, with the protest for non-acceptance, filed in court, and it being stated that the *U. S.* had complied with the law, and had made proof of their damages &c.—*Held*, to be sufficient. *Ib.*
6. An attachment ought regularly to issue as of the term at which it was awarded; and it is the duty of the sheriff to serve the *seire facias* in the attachment on the persons who are found in possession of the property attached, and to certify such service; or if the property is unoccupied, to make a corresponding return. *Ib.*
7. Although the intervening of a term before the issuing of an attachment which is awarded, and the negligence of the marshal in not serving the *seire facias* in the attachment, &c. and making his return in conformity thereof, are irregularities in the proceedings of the circuit court offered in evidence, yet the judgment of condemnation is not therefore void, that court being a court of record of competent jurisdiction, from whose decisions an appeal or writ of error lies to the supreme court. *Ib.*
8. — It is not like the case of special and extraordinary powers given by statute to a court which has no jurisdiction independent of such statute. *Ib.*
9. The proceeding by attachment is only process to compel the appearance of a defendant whose person cannot be reached by the process of the court; and is not a proceeding in derogation of the principles of the common law, but rather in mitigation of the severity of the common law in favour of defendants. *Ib.*
10. Under the act of 1795, *ch* 56, no attachment can issue except the attaching creditor appears by the proceedings to be a citizen of this state, or some other of the *United States*. *Yerby v Luckland et al. Garn. Beeding*, 446
11. — It is not sufficient that he appears to be a citizen of the *United States*. *Ib.*
12. One may be a citizen of the district of *Columbia*, or of either of the other territories of the *United States*, and not be a citizen of any one of the states, within the meaning of the act of 1795, *ch* 56; and no citizen of the said district, or of the territories, can issue an attachment under that act. *Ib.*
13. Whether or not an attachment can be laid on the undivided interest of the defendant's wife in the real estate acquired by her under the will of her father, where, by an act of assembly trustees were appointed, (and who accepted,) for the sale of the real estate of the deceased for the payment of his debts, and the surplus to be divided amongst his representatives? *Quere* *Ib.* 451
14. — Can an attachment be laid in the hands of the executors of the deceased for the wife's proportion of the rents and profits by them received from the said real estate? *Quere. Ib.*
15. — Can the executors, as garnish-ees, set off against the plaintiff's claim, for such rents and profits, their demand for a sum of money overpaid to the husband on account of the personal estate? *Quere. Ib.* 453
16. An affidavit for an attachment under the act of 1795, *ch* 56, must state that the plaintiff is a citizen of this state, or some other of the *United States*, and on the plea of *non assumpsit*, the fact of such citizenship must be proved. *Mandeville v Jarrett, Garn. of Griffith*, 497
17. Whether or not a debt in litigation can be attached? *Quere. Ib.*
- See Husband and Wife 3.

AUTHORITY.

See Special Authority.

AVERMENT.

See Agreement 3, 4, 8.

— Bank Notes 1.

— Days of Grace

— Declaration 2, 3, 4.

— Indictment 1.

— Inn Keeper 5.

— Judgment 1.

— Promissory Note 9.

AWARD.

1. An award by arbitrators cannot be impeached for erroneous judgment upon facts. *Cromwell et al. v Owings*, 102. Exceptions to an award cannot be founded upon any thing *de hors*, but must always be confined to matters appearing upon the face of it, compared with the proceedings in the cause, and are never heard upon affidavits. *Ib.*

8. To set aside an award for matter *de hors*, as corruption or misbehaviour on the part of the arbitrators, or other charges to be sustained by evidence, it can only be done on motion supported by affidavits. *Ib.*
4. If an award be both of matter that is submitted, and of that which is not within the submission, it may be good as to all that is within the submission, and void as to the residue. *Ib.*
5. If an award discloses the ground taken by the arbitrator in forming his opinion, the case is open to the inquiry, whether he committed a mistake in point of law. *Huitt & Russell v The State use of Brown*, 95
6. If a question of law is decided by an arbitrator, selected by the parties, for the purpose of finally settling such a question between them, they are bound by the award—*Semble. Ib.*
7. Under a general submission to arbitrators, their award may be impeached for an error in law. *Ib.*
8. Arbitrators must give the parties concerned notice of the time and place of their meeting on the arbitration. *Rigden v Martin*, 403
9. — It is not necessary, however, that the award itself should state that such notice was given. *Ib.*
10. To impeach an award for the want of notice, or on account of any other fact *de hors* the award, an application, supported by affidavit, must be made to set it aside. *Ib.*
11. Where arbitrators are authorised, on their differing in opinion, to call in a third person, they may call him in immediately, and before they differ. *Ib.*
12. An award is not vitiated by the arbitrators joining with the umpire in making it. *Ib.*

B.

BAILMENT.

See Agent 1.

- Assumpsit 9, 10, 11.
- Contract 1, 2, 3, 4.
- Inn Keeper.

BALTIMORE.

1. Under the *second section* of the act of 1797, *ch. 54*, the corporation of the city of *Baltimore* have no power to tax any particular part of the city, for paving the streets, lanes and alleys, in such part, unless such paving is for the benefit of such part especially. *The Mayor &c. of Baltimore v Moore & Johnson*, 375

2. If the corporation, in the preamble to an ordinance to provide for the pavement of streets, state the object to be one of general benefit to the city, they cannot in the same ordinance tax exclusively the particular part of the city in which the streets are located. *Ib.*
3. — If such an ordinance is passed without its stating what the object of the pavement is, the legal presumption is, that it is the especial benefit of the part of the city where the streets are situated. *Ib.*

See Corporations 1.

BANK.

1. Where a charter incorporating a bank, reserves for the use and benefit of the state certain shares of the capital stock, to be subscribed for in such manner as the legislature may direct, and also provides that any director, &c. holding any shares therein, who shall commit any fraud, &c. shall be liable to prosecution by indictment in the name of the state. It is a public law, and must be judicially taken notice of as all other public laws. *Towson v The Havre de Grace Bank*, 47
2. In a charter creating a corporation, subscriptions were authorised for raising the capital stock, to be paid by instalments, and when a certain amount was subscribed, the proprietors of shares, either as subscribers or assignees of such subscribers, were created a body politic. H P, who was a subscriber, assigned his stock to W B before the whole of the instalments were paid.—*Held*, that there was such a privity between the corporation and W B, as enabled them to sustain an action of *assumpsit* against him for the amount of the instalments which had not been paid. *Bend v The Susquehanna Bridge & Bank Company*, 128

See Days of Grace.

- Master & Servant 1.
- Promissory Note 8, 9.

BANK NOTES.

1. An objection that the allegation in the declaration is of the loss of money in bank notes, and that bank notes are not money, cannot be sustained. *Towson v The Havre de Grace Bank*, 47
2. Bank notes are a legal tender, unless specially objected to at the time; and will pass by will, under the general description of money. *Ib.* 53

BANKRUPT.

See Evidence 6.

BARGAIN AND SALE.

1. The statute of uses of 27 Hen. VIII, ch 10, affects a deed of bargain and sale no farther than to vest the legal estate in the bargainee. *S. & R. W. West v Biscoe*, 460
2. *H. W.* conveys her real estate by deed of bargain and sale to *W B*, in trust for her two sons, *S* and *R*, "provided that they shall, before they receive any benefit or interest under the trust, pay, or cause to be paid, or secure to be paid, £500, to each of her two granddaughters *M O* and *H O*."—*Held*, that the £500 were a charge on the estate. *Ib.*
3. If the *habendum* in a deed of bargain and sale is to the grantor, it shall be rejected, and the use enure to the grantee. *Bend v The Susquehanna Bridge & Bank Company*, 123
4. An exemplification of the enrolment of a deed of bargain and sale of a recent date; is competent evidence of title to lands; without producing the original. A person claiming under the grantor of such deed, but claiming against the deed, is not precluded from showing that it was obtained by fraud. *Hurn's Lessee v Super*, 276

See Conveyance:

BARON AND FEME.

See Husband and Wife.

BEQUEST.

1. Where a testator by his will directs the trustees and guardians of his child to pay over annually a certain portion of the income of his estate to the trustees of *Hillsborough* school, to be by them "applied towards feeding, clothing, and educating the poor children of *Caroline* county; which attends the poor or charity school established at *Hillsborough* in the said county"—*Held*, that the bequest was void for uncertainty as to the persons who were to take under it. *Dashiell, et al. v The Attorney General*, 1
2. The poor children of a county, or congregation or school, are not susceptible of ascertainment. *Ib.*
3. The interposition of trustees does not make a bequest good, which as an immediate and direct bequest would be void for uncertainty. *Ib.*
4. The poor children of *Caroline* county, who attend the *Hillsborough* school, are not a body corporate, and cannot take in succession; and a bequest to

them, if otherwise good, must fail as soon as the first objects of the testator's beneficence ceased to attend the school. *Ib.*

5. The benefit of the undisposed subject of the trust results to the next of kin of the testator. *Ib.*
6. *R T* by her will, bequeathed to *S T* five negroes by name, during her natural life, them and their increase, and that after the death of *S T*, the above named negroes be free—*Held*, that the words "the above named negroes," were intended to be used as words of description, and apply to all who were the subject of the bequest, the issue as well as their mothers. *Hamilton v Cragg*, 16
7. *W G*, by his will bequeathed as follows: "I order my executor hereafter named, to reserve from my estate the sum of \$6000, as a legacy to be paid to *W G*, aged about 14 years, and christened under that name at *Havanna*, in May or June 1804; which youth I acknowledge to be my natural son. I order my executor to invest the said \$6000 in such way as to produce an interest for the support and maintenance of the said *W G*, until he is of age, and then to pay him the capital or part remaining, in case the interest would not be sufficient for his maintenance during his youth."—*Held*, that the legacy to *W G*, the son, was vested at the death of the testator. *Lemonnier v Godfroid's adm'rs.*, 472
8. Where the testator gives interest in the mean time, he gives a property in the principal, unless there be something on the face of the will to prevent its having such an operation. *Ib.* 474
9. Wherever there are strong circumstances, to be collected from the will, indicating the intention of the testator to be, that the interest in the bequest shall immediately vest, although there be a future time fixed for the payment, such intention shall prevail, although words of immediate gift are wanting. *Ib.*

- See Court of Chancery 42.
- Executor & Administrator 14.
- Issue 2, 3.

BILL IN CHANCERY.

See Court of Chancery 8, 9, 10, 11, 33, 41.

— Pro Confesso 1.

BILL OF EXCHANGE.

1. In an action on an inland bill of exchange by an incorporated bank, as

the holders of the bill which they had discounted before it became due, against the payee, evidence was given that the acceptors of the bill, on the day it became due, and for a long time before, and for several months thereafter, kept an account at the said bank, by depositing, and from time to time checking out money, and that on the day the bill became due they had no money in bank, but that about a month afterwards a balance was struck between the bank and the acceptors, when they had in bank a sum of money sufficient to have discharged the bill—*Held*, that the bank was entitled to recover the amount of the bill from the payee. That the conduct of the holders of the bill with regard to the acceptors, was not a waiver of their right against the endorers, nor a release as to them. And as between the holders and the acceptors there was no payment. *Martin v The Mechanics Bank of Baltimore*, 235

2. The holder of a bill may forbear to sue the acceptor as long as he pleases, and will not thereby discharge the other parties from their liability, provided he does not agree to give time to the acceptor, without their concurrence. *Id.*
3. Can the court assess damages on a bill of exchange or promissory note, without a writ of inquiry, where judgment has been rendered by default? *Querè. Jackson v The Union Bank of Maryland*, 151, (note)
See Promissory Note.

BILL OF SALE.

1. A bill of sale of personal property executed and acknowledged, but not recorded, is void as to creditors, if made to their injury; but is binding on the donor, her executors, administrators and assigns, and all claiming under her, both at common law, and under the act of assembly of 1729, ch 3, s 6. *Dorsey v Smithson*, 61
2. The executor of the donor has no right to the goods and chattels mentioned in the bill of sale. He is estopped to allege that the deed is in fraud of creditors; and the property is not assets in his hands, and as executor he is not accountable for it. *Id.*
3. If the bill of sale is fraudulent as to creditors, the donee is chargeable to them to the full extent of the property transferred, as executor *de son tort* of the donor. *Id.*
See Agreement 12.

BILL OF LADING.

See Contract 1, 2.
— Declaration 3, 4.

BILL OF PARCELS.

See Parol Evidence 4.

BINDING DECISION.

1. The court of appeals has adopted, and considers itself bound by the decision of the supreme court of the *United States*, respecting the state insolvent laws. *The State use Rogers v Krebs et al. Garn. of Horne*, 31 (note)

BLANK ENDORSEMENT.

See Promissory Note 4, 14, 15, 16.

BOND.

1. In an action on a bond, conditioned to refund a legacy if a deficiency of assets should happen, after request should be made, it is unnecessary to prove a special request to refund. *Salisbury v Black's Adm'r. D. B. N.* 293

See Appeal Bond.

— Sheriff 2.

BOND OF CONVEYANCE.

1. In an action of debt on a bond conditioned for the conveyance of a tract of land, (the purchase money being paid,) to recover damages for a breach of the condition—It was *held*, that the value of the land, at the time of the breach of the contract, was the measure of damages, and not the amount agreed to be paid. *Cannell v Mc Clean*, 297

C.

CALLS.

See Conveyance 2.

CAUSE OF ACTION.

1. A judgment by default in *assumpsit* on a promissory note, is an admission of the cause of action, and the defendant's liability to the amount of the note, which must be produced, though it need not be proved. *Kiersted v Rogers & Garland*, 282
See Attachment 5.
— Judgment 1.

CERTIFICATE.

1. A certificate of a clerk of a county court, that the two persons, before whom a deed purports to be acknowledged, were at the time of such acknowledgment, "two justices of the

- peace for the county aforesaid, and to all certificates, by them given *as such*, due faith and credit is and ought to be given, as well in courts of justice as thereout," is a sufficient certificate to authorise the recording of the deed among the records of the county in which the land conveyed by such deed lies. *Beall's Lessee v Lynn*, 336
2. Where the law requires the clerk to give a certificate, and he substantially complies with it, it is sufficient.

Ib. 355.

CHANCERY.

See Court of Chancery.

CHARGE.

See Conveyance 15.

— Court of Chancery 39.

CHARTER PARTY.

See Parol Evidence 9.

CHOSE IN ACTION.

See Fieri Facias 6.

— Husband and Wife 2, 3, 4.

CIRCUIT COURT OF U. S.

See Attachment 1, 7, 8.

— Judgment 3, 4.

CITIZEN.

See Attachment 10, 11, 12, 15.

CLERKS OF COURTS.

See Certificate.

COMMISSION & COMMISSIONERS.

See Insolvent Debtors 4.

COMMON CARRIER.

1. If the goods contracted to be carried to a particular place and safely delivered, were either in fact negligently lost, or safely conveyed and delivered to a wrong person, though by mistake, or if any other act was done rendering a delivery of them impracticable, the carrier was entitled to no freight, and of consequence the owner was under no obligation to pay or tender the amount of the freight. *Ferguson v Cappeau's Adm'r.*

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2. The question, whether the goods were safely carried and delivered to the owner, or other person having authority to receive them, is a question of fact proper for the decision of the jury.

Ib.

See Assumpsit 9, 10, 11.

— Contract 1, 2, 3, 4.

— Declaration 2, 3, 4.

COMPETENCY OF WITNESS.

1. If a party objects to the competency of a witness offered on the adverse side, and the court sustain the objection, and the party making it afterwards waives it, and consents that the witness be examined, the party offering the witness has no right to require of the court to decide that he is competent independent of the waiver of the objection. *Beall's Lessee v Lynn*, 336

2. A surety in an administration or testamentary bond, is a competent witness for the administrator or executor. *Ferguson v Cappeau's adm'r.* 394

3. An executor is a competent witness to prove transactions between himself and the guardian of the children of the deceased, in an action against such guardian by a third person. *Fenwick's adm'r v Forrest*, 415

See Executor & Administrator 11.

— Guardian & Guardians Bond 2.

— Husband & Wife 5, 6.

COMPOUND INTEREST.

See Court of Chancery 42.

CONDITION.

See Conveyance 15, 16, 17.

CONDITION PRECEDENT.

See Agreement 12.

— Court of Chancery 39.

— Covenant 2.

CONSENT.

See Competency of Witness 1.

CONSEQUENTIAL INJURY.

See Actions 1.

CONSIDERATION.

1. If the plaintiff, at the time of taking a promissory note, knows that the article which forms its consideration is defective, and fraudulently conceals that defect from the defendant, he can sustain no suit on the note. *Sides v Hilleary*, 86
2. — Whether the plaintiff had such knowledge, and concealed it from the defendant, is a question for the jury.

Ib.

3. In an action of debt to recover damages for a breach of the condition of a bond to convey land, the consideration money being paid—it was held, that the value of the land, at the time of the breach of contract, was the measure of damages, and not the amount agreed to be paid; but it is otherwise in an action upon a cove-

nant of *seizin* in a deed of conveyance, in which case the consideration money of the deed is the measure of damages. *Cannell v McClean*, 297

See Assumpsit 3, 4.

— Conveyance 6.

— Parol Evidence 1, 8.

— Purchase & Sale 1.

CONSIGNEE.

1. If a foreign merchant sends goods to his consignee, with instructions to dispose of them for him to the best advantage, and the consignee sends them to auction for sale, and the auctioneer makes way with them, or sells them, and makes way with the money, and fails, the consignee is not answerable. *Jackson v The Union Bank of Maryland*, 146

See Lien.

CONSTITUTION.

1. The property qualification required by the 42d article of the constitution of this state, was not intended as a fund to secure the sheriff's official creditors in addition to the bond required of him as sheriff. *Roberts v Gibson's Ex'r. et al.* 116
2. Other clauses of the constitution may be resorted to in aid of the construction of that which may be doubtful or uncertain. *Ib.*
3. Where the same language is used in different clauses of the constitution, upon the same or similar subjects, it must receive the same construction, unless some particular reason to the contrary can be assigned. *Ib.*
4. The act of assembly of 1821, *ch.* 244, directing the removal of criminal causes from *Baltimore* city court to *Baltimore* county court, and from *Baltimore* county court to *Baltimore* city court, is repugnant to the constitution, and therefore void. *The State v Dashiell*, 268

See Court of Chancery 15.

CONSTRUCTION.

See Acts of Assembly 1, 2, 4, 5, 6.

— Appeal Bond 1.

— Attachment 4.

— *Baltimore* 1, 2, 3.

— Bequest.

— Constitution 1, 2, 3, 4.

— Covenant 2.

— Indictment 1.

— Settlement 1.

— Statutes 1, 2.

— Will 2, 3, 4, 8.

CONTRACT.

1. A contract made by the master of a *general ship*, is in law the contract of the owner, the master being considered the duly constituted agent of the owner for that purpose; and each is separately bound to the performance of it. *Ferguson v Cappeau's Adm'r.* 394
2. A bill of lading, signed by the master, for goods delivered on board his vessel for transportation, is the contract of the owner of the vessel. *Ib.*
3. If the bill of lading contains an exception "of the dangers of the seas," such exception must be stated in the declaration. *Ib.*
4. Every proviso in a contract, which goes to discharge the liability under it entirely, must be stated in the declaration—otherwise if it only goes to diminish the liability. *Ib.*
5. If a contract is made for the payment of tobacco, which is not complied with, the plaintiff in *assumpsit* on that contract may recover the value of the tobacco in money. *Lyles v Lyles's Ex'rs.* 273
6. — The value of the tobacco to be estimated at the day of payment by the contract. *Ib.*
7. In an action of debt on a bond for the conveyance of land, in which the consideration money was stated to be paid, evidence was offered by the defendant to prove that the land to be conveyed was in exchange of land sold to him by the plaintiff—*Held* by the county court, that the contract appears, from the bond of conveyance, to be a monied transaction between the parties, and that the defendant was estopped to say otherwise, and that the testimony in relation to an exchange of lands between the parties was not legal evidence. *Cannell v McClean*, 299

See Agreement.

— Bill of Parcels.

— Bond of Conveyance 1.

— Common Carrier 1.

— Court of Chancery 48, 49, 50.

— Extinguishment 1.

— Parol Evidence 1, 5, 14.

— Specific Performance.

CONTRIBUTION.

See Court of Chancery 15, 17.

CONVEYANCE.

1. If the *habendum* in a deed of bargain and sale is to the grantor, it shall be rejected, and the use enure to the

- grantee. *Bend v The Susquehanna Bridge & Bank Co.* 128
2. Where part of a tract of land called *H* is conveyed, and calls to begin at the end of 100 *perches* on the third line of *H*, as owned by *P*, and the third line of *H* is described in the grant, "S S W 50 *perches* to a bounded red oak"—Whether the parties intended that the beginning should commence at the end of 100 *perches* of the third line of that part of the tract which was owned by *P*, or at some other point, is a question of fact for the jury. *Connelly v Bowie* 141
3. Where the official character of the persons before whom the acknowledgment of a deed for lands executed in 1738, does not appear on the face of the acknowledgment, and it is equally silent as to the county in which it was taken, and there is no evidence to warrant the presumption that the original deed was acknowledged in conformity to the provisions of the act of 1715, *ch* 47, a copy cannot *per se* be read in evidence. *Ib.*
4. — If the party claiming under such deed had offered evidence that the grantee, and those claiming under him, had possessed and enjoyed the land under the title of the grantor, a strong foundation would have been laid for presuming that the original deed was acknowledged in conformity to the provisions of law. *Ib.*
5. No official copy of a deed, or other instrument of writing, is *per se* evidence; except the original is required to be recorded. *Ib.*
6. The exemplification of the enrolment of a deed of bargain and sale of a recent date, is competent evidence of title to lands, in an action of ejectment, without producing the original. A person claiming under the grantor of such a deed, but claiming against the deed, is not precluded from showing that it was obtained by fraud. *Hurn's Lessee v Soper*, 276
7. Parol evidence is inadmissible to prove that a deed was not given for a money consideration, and therefore inoperative as a deed of bargain and sale, where the deed sets out a money consideration. *Ib.*
8. A deed of a nonresident grantor, acknowledged by an attorney under a letter of attorney proved before one justice of the peace only, is invalid. *Beall's Lessee v Lynn*, 336
9. — If possession has gone with such a deed, yet if a plaintiff in ejectment produces the deed as evidence of his title, there can be no presumption that the same was legally executed and acknowledged, tho' if it was not produced, a legal conveyance might be presumed. *Ib.*
10. A certificate of a clerk of a county court, that the two persons, before whom a deed purports to be acknowledged, were at the time of such acknowledgment, and still are, "two justices of the peace for the county aforesaid, and to all certificates, by them given as such, due faith and credit is and ought to be given, as well in courts of justice as thereout," is a sufficient certificate to authorise the recording of the deed among the records of the county in which the land conveyed by such deed lies. *Ib.*
11. A mixed possession will not prevent the presumption of a deed, unless the same is held by both parties claiming title to the same land. *Ib.*
12. Where a plaintiff in ejectment produces a patent to B for the land for which he sues, dated in 1774, and produces a deed for the same land from C to F, dated in 1785, containing a recital of a deed also for the same land, from B, the patentee, to C, and proved a possession in C, of a part of said land, until 1785; and in F, claiming under him; and in the lessor of the plaintiff, claiming under F, and all claiming to hold such possession under a title to the whole tract, a conveyance from the patentee to C may be presumed. *Ib.*
13. Family settlements are to be construed most favourably to promote and effectuate the intentions of the party settling. *S. & R. W. West v Biscoe*, 460
14. The statute of uses of 27 Hen. VIII, *ch* 10; affects a deed of bargain and sale no farther than to vest the legal estate in the bargainee. *Ib.*
15. *H W* conveys her real estate, by deed of bargain and sale, to *W B*, in trust for her two sons *S* and *R W*, "provided that they shall, before they receive any benefit or interest under the trust, pay, or cause to be paid, or secure to be paid, £500 to each of her two granddaughters, *M O* and *H O*"—Held, that the £500 were a charge on the estate. *Ib.*
16. If *S* and *R W* take possession of the estate under such conveyance, they become personally liable for the

£500, and may, in equity, be enforced, personally to pay it. *Ib.*

17. Where the deed makes the £500 payable to the granddaughters on their arrival at the age of 16 years, or on their marriage, and they do arrive at that age, or marry, before S and R W take possession of the estate conveyed, the right to the £500 is a vested right, and becomes payable to the granddaughters, or their representatives, on S and R W taking possession, with interest thereon from the time the granddaughters did so respectively arrive at the age of 16 years, &c. *Ib.*

18. — One of the granddaughters having married and died in the life-time of her grandmother, her portion survived to her husband. *Ib.*

See Bargain & Sale.

- Court of Chancery 15, 21, 22,
- Damages 1.
- Election 1, 2.
- Insolvent Debtors 2.
- Letter of Attorney 1, 2, 3, 4.

COPY.

1. No official copy of a deed, or other instrument of writing, is, *per se*, evidence, except the original is required to be recorded. *Connelly v Bowie*,

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Hurn's Lessee v Soper.

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2. An exemplification of the enrolment of a deed of bargain and sale of a recent date, is competent evidence of title to the lands conveyed, without producing the original. *Hurn's Lessee v Soper*,

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See Conveyance 3, 6.

- Evidence 9, 10.
- Executor & Administrator 10.
- Will 7.

CORPORATIONS.

1. The possession of a power to do an act, is of itself the possession of the right to provide for the doing of that act by agents. But the giving a power to a corporation, and the giving authority to provide for the exercise of a power, are different—the authority to provide for the exercise of a power not being the possession of the power itself, but a right only to confer it, or to authorise the exercise of it by others. *The Mayor &c. of Baltimore v Howard*,

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See Baltimore.

- Bank 1, 2.
- Bequest 2.
- Public Laws.

COSTS.

1. The judgment for costs against a plaintiff executor or administrator, is never *de bonis testatoris*, and the testamentary or administration bond is not liable for such costs. *Ferguson v Cappeau's adm'r.*

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COUNTER SECURITY.

See Administration Bond.

- Evidence 8.
- Executor & Administrator 3, 4.
- Guardian & Guardian's Bond 1.
- Orphans Court 1, 2.

COURT.

1. An agreement between the parties to arbitrate a dispute between them does not divest courts of justice of their jurisdiction. *Allegre v The Maryland Insurance Company*,

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2. The discretionary powers of courts of law are confined within fixed and well established limits, and are to be exercised to further, not prevent, the administration of public justice. *Ib.*
3. The county court has not a right of their own mere motion to refuse permission to the plaintiff to proceed in the trial of his cause—as where the court had decided a question against the plaintiff, in an action on a policy of insurance, to which he asked leave to except. While drawing the bill of exceptions, the counsel of the plaintiff was asked by the court if he intended to go on with the cause, or whether the opinion given by the court would end it? He replied that it would, when the court, with the consent of the counsel on both sides, discharged the witnesses. Before the jury retired, the plaintiff's counsel denied the usage of exhibiting the invoice, and refused to insert it in the exception. The counsel of the defendant then called a witness, who had been discharged, by whom he proved the usage. The plaintiff's counsel offered then to go on with the cause, and to prove that the invoice had been in fact exhibited; but the court refused to permit him; and compelled him either to be *non suited*, or to suffer a verdict for the defendant. It was held that the court erred. *Ib.*

4. Where no objection is taken to the sufficiency of evidence offered at the trial, the court will not instruct the jury as to the sufficiency of such evidence to prove a particular fact. *Fenwick's adm'r v Forrest*,

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COURT OF APPEALS.

1. The court of appeals has adopted, and considers itself bound by the decision of the supreme court of the *United States* respecting the state insolvent laws. *The State use of Rogers v Krebs et al. Garn. of Horne*, 31 (note)
 2. On a writ of error the appellate court examines the entire record, and reverses the judgment if there be error in any point, though the judgment of the court below is right on the particular point by them decided. *Speaks v Sheppard*, 81
 3. Where a decree states that the cause was ready for hearing, it will be presumed by the appellate court that it was, though it does not appear to have been set down for hearing. *Rigden v Martin*, 403
- See Appeal.

— Writ of Error.

COURT OF CHANCERY.

1. A decree in equity for the sale of lands to pay debts or legacies, or for the purpose of distributing the proceeds among those entitled, is a proceeding *in rem*. *Tongue v Morton*, 21
2. The chancellor has the power of enforcing a decree, by ordering the possession of the land sold to be delivered to the purchaser under the decree, in certain cases. *Ib.*
3. The exercise of this power, in relation to all such persons as were parties to the proceedings, and whose rights have been determined by the decree, is essential to the full administration of justice. *Ib.*
4. Persons who come into the possession of the land sold, *pendente lite*, claiming title to it under the parties to the bill, or some of them, stand in the same predicament with those whom they represent in point of interest. *Ib.*
- 5 — But where a person was in possession at the time the bill was filed, claiming adversely, and was not a party to the decree, his interest cannot be affected by it; and from such possession he cannot be removed until his title is adjudged to be defective in the regular and established course of judicial proceedings, and not in a summary manner by way of motion. *Ib.*
6. How far a third person, who comes into possession of land during the pendency of the suit in equity, claiming adversely to the litigating parties, can, after a decree and sale, be removed in a summary way at the instance of the purchaser? *Quere.* *Ib.*
7. The court of chancery, in the exercise of its moral jurisdiction, will, upon the proof of fraud, mistake or surprise, raise an equity by which the written agreement of the parties shall be rectified. *Wesley et al. v Thomas, et ux. adm'r of Pamphrey*, 24
- 8 — It is essential, however, that such fraud, mistake or surprise, should be alleged in the bill as the ground and object of the parol proof. *Ib.*
9. The relief to be given under a general prayer in a bill, must be agreeable to the case made by the bill, and not different from, or inconsistent with it. *Chalmers v Chambers*, 29
10. Where a bill was filed to have a mortgage deed recorded, which had been omitted to be recorded within six months, and closes with a general prayer for other and further relief, &c. a decree that the mortgage premises be sold, &c. is not within the relief prayed by the bill. *Ib.*
11. A bill for one purpose cannot be made to answer another. *Ib.*
12. A obtained a decree against the executors of B, for a sum of money. He afterwards filed a bill against the devisees and executors of B, in order to have a sale of the real estate of B to pay the said debt, upon the principle that the personal estate was insufficient, and he wholly relied for evidence of his debt on the decree—*Held*, that it appearing, by the account upon which that decree was founded, which was for rents received by B, and his executors, of the estate of A; that at the time of the death of B he was a creditor of the estate of A, and that the sum of money decreed against the executors of B, had been received by them for the rents—the real estate in the possession of the devisees of B is in no way responsible for it. *Carnan, et al. v Turner*, 65
13. In the event of the exhaustion of the personal assets of a deceased in the payment of debts, the real estate is answerable to the creditors for the deficiency; but the claimants must prove themselves creditors of the deceased ancestor. *Ib.*
14. How far a judgment or decree against executors may be used in evidence against the devisees of the testator? *Quere.* *Ib.*
15. A, in order to make B eligible as sheriff, in case he should be elected, conveyed to him certain lands, with an agreement that they should be reconveyed, &c. B was not elected, but was returned as having the next high-

- est number of votes to C, who was commissioned sheriff. B reconveyed the lands to A, and C dying within the time for which he was elected, B was commissioned as sheriff, according to the constitution, for the residue of the term, and gave bond, and having become a defaulter, his sureties in his bond became answerable, and paid considerable sums of money for him, and filed a bill in chancery against A, alleging that the deeds between A and B were a fraud upon the law, and that the sureties, as creditors of B, had a right to have the land sold for the payment of their debt—*Held*, that although the transaction between A and B may be considered a fraud upon the law, it did not necessarily follow that every subsequent creditor of B could take advantage of it; that if B had refused to reconvey the land to A, the law never would have lent its aid to A, who was *particeps criminis*, to obtain its restoration; nor would it enforce the performance of a contract made in violation of its policy. But if a third person, a subsequent creditor, attempts to vacate the deed of reconveyance on account of fraud against the public, he must show either that it was fraudulent against creditors generally under the statute of 13 *Eliz. ch. 5*, or that it was a deception or misrepresentation practised upon him, by which he was induced to become the creditor of B, and to consider the land a fund for his security. *Roberts v Gibson's Ex'r. et al.* 116
16. — This case is not embraced by the statute of 13 *Elizabeth, ch. 5.* *Ib.*
17. — The sureties, having full knowledge of the deeds, and no imposition or concealment having been practised upon them, by which they were fraudulently induced to become the creditors of B, and to consider the lands as his property, and answerable for his debts, are not entitled to relief. *Ib.*
18. — B being dead, whether or not his heirs ought to have been made parties? *Ib.*
19. Where a complainant has established his right to certain negro slaves, he can, by a new bill, recover the value of the issue born after the first bill was filed, and not included in the former decree. *Crapster v Griffith,* 144
20. — He is also entitled to the value of the services of such slaves from the time of the auditor's statement, down

to the period of their actual delivery under the decree, by which his right to them is ascertained. *Ib.*

21. The complainant's bill alleged a contract for the whole of a square of ground, payment of the purchase money, and possession under the contract. The defendant's answer denied the contract as to the whole square, but admitted it as to part; and also denied payment of the purchase money, and possession of the whole square—*Decreed*, that on payment of the whole purchase money, and interest, the defendant should convey the part of the square. *Graham, et ux. v Yates & Myers's heirs et al.* 229
22. Where a bill in chancery stated that M had a life estate in all the tract of land called *Oliver's Neck*, the remainder in fee being in C, and that C sold to M all his interest in the land; that the purchase money was paid by M, who retained the possession of the land until his death, and that his representatives, the complainants, afterwards retained possession. Although the testimony did not establish the complainant's claim to the extent stated in the bill, yet it proved a contract between C and M for one fourth part of the tract; that the purchase money was paid by M, and the possession of the land permitted to be retained by him under the contract—*Held*, that the complainants were entitled to a conveyance of the one fourth part of the tract; that permitting the possession to be retained by M, under the circumstances of the case, was equivalent to an actual delivery, and with the payment of the purchase money took it out of the statute of frauds. *Drury et al. v Conner et al.* 283
23. In equity, as at law, the *allegata* and *probata* must, to a certain extent, agree. But where the question is only the extent of relief, the complainant may be permitted to recover a part only of what he claims. *Ib.*
24. The answer of a defendant to a bill in chancery, in a former cause, is not legal evidence in a cause against his representatives relative to the same transactions. *Ib.*
25. The answer of a defendant, professing a want of knowledge of the facts stated in the bill, cannot be considered as evidence against those facts—its only legal effect is to compel the complainant to establish them by testimony. *Ib.*

26. The court of chancery of this state is governed by the principles of the *English* court of chancery, so far as the same are applicable. *Thompson v M'Kim, et al.* 302
27. An appeal from the court of chancery in this state does not, *per se*, suspend proceedings on the decree appealed from. *Ib.*
28. — Pending such an appeal, the chancellor, if applied to for that purpose, may order the proceedings to be suspended, on such terms as the peculiar circumstances of the case may be found to require; or a special order to the same effect may be passed by the appellate court. *Ib.*
29. Under the act of 1713, *ch. 4*, parties are entitled to an appeal as a matter of right; and the provisions of that act, so far as relates to the manner of prosecuting appeals, have been extended by the act of 1729, *ch. 3*, to appeals from chancery. But the 2d section of the act of 1713, *ch. 4*, does not apply to appeals from chancery. *Ib.*
30. Where a decree states that the cause was *ready for hearing*, it will be presumed by the appellate court that it was, although it does not appear to have been set down for hearing. *Rigden v Martin,* 403
31. Fraud may be inferred from facts and circumstances—from the character of the contract, or from the condition and circumstances of the parties. *Watkins v Stockett's adm'r. D. B. N. et al.* 435
32. Parol evidence is inadmissible to vary or contradict the clear import of a written instrument, as well in equity as at law, except where fraud is charged, or in cases of trusts. *Ib.*
33. Unless fraud in obtaining a contract is charged in the complainant's bill, parol evidence of it cannot be received. *Ib.*
34. Where the defendant's answer to a bill, alleging a contract to have been entered into by mistake, denies the mistake, the strongest proof is necessary to destroy the effect of the denial. *Ib.*
35. S executes in favour of W, an absolute deed on its face, of his real and personal estate, for a certain monied consideration stated by the deed to have been paid by W, and then dies. In a bill filed by the representatives of S, stating that the deed was intended as a mortgage only, and praying to redeem, and W, in his answer, denying that the deed was intended as a mortgage, and insisting that it was designed to be an absolute conveyance—*Held*, that under all the circumstances the complainants were not entitled to relief. *Ib.*
36. Has the chancellor authority, under the act of 1785, *ch. 72, s. 4*, to direct the sale of land for the payment of debts, &c. where by the will of the testator, no person is appointed to sell or convey the same? *Quere. Tongue v Morton,* 22
37. Is it competent for a complainant, who seeks a specific execution of a contract, to offer parol evidence of fraud or mistake for the purpose of proving that the parties intended to give a different sense to the instrument from that which it imports? *Quere. Wesley, et al. v Thomas, et ux.* 28
38. To set aside a deed, or give it a different efficacy from that which it naturally and legally imports, so far as the grantee, or his legal representatives, are concerned, would, against the defendant's answer, require not only the allegation, but the most unequivocal evidences of fraud on the part of the grantee. *Watkins v Stockett's adm'r. D. B. N. et al.* 444
39. H W conveys her real estate by deed of bargain and sale to W B, in trust for her two sons S and R W, "provided that they shall, before they receive any benefit or interest under the trust, pay, or cause to be paid, or secure to be paid, £500 to each of her two granddaughters, M O and H O, at their arrival at the age of 16 years, or day of marriage, which ever shall first happen." M O and H O arrived at the age of 16 years in the life-time of H W, and before S and R W took possession of the estate conveyed—*Held*, that the £500 were a charge on the estate; that on S and R W taking possession of the estate, they became personally liable for the £500, and may, in equity, be enforced, personally to pay it; that the right to the £500 is a vested right, and becomes payable to M O and H O, or their representatives, on S and R W taking possession, with interest thereon from the time M O and H O did so respectively arrive at the age of 16 years. *S. & R. W. West v Biscoe,* 460
40. — H O having married and died in the life-time of H W, her portion survived to her husband. *Ib.*
41. Under what circumstances a bill may be taken *pro confesso* against one of the defendants. *Ib.*

42. C G by will, bequeaths, among other things, as follows: "I give and bequeath to my executors her in after named, or the survivor of them, the sum of \$6000, to be put to interest, or vested in some stock or funds, within one year after my decease, and the interest arising therefrom, I direct my said executors to pay annually to my daughter P C, for and during her natural life, if in the opinion of my said executors, or the survivor of them, it should be necessary for her decent support; and upon the decease of my said daughter, I order and direct the said sum of \$6000, with the interest accrued thereon, if any should remain unexpended, to be equally divided among the three children of the said P C."—On a bill filed by P C, and her husband, against the executors to enforce the trust created by the bequest—*Held*, 1. That although the executors abuse their trust by not paying to P C the interest on the \$6000, (she being in a situation to need it for her decent support,) and by not investing the \$6000 as directed by the bequest, they are not liable to pay interest on that interest, unless it is proved that they had appropriated the bequest, or the proceeds thereof, to their own use, or in some way made profit therefrom, or subjected them to hazard. 2. That the executors were not bound or authorised to invest the accruing interest on the \$6000, which might remain in their hands unappropriated to the support of P C, but were bound to hold the same to be applied to her support, as her wants might require. 3. That it is not necessary to make the *children* of P C parties. 4. That the defendants, (the executors,) bring into the court of chancery on, &c. the amount of the interest now due, with interest thereon from, &c. and 5. That they annually, during the life-time of P C, bring into the court of chancery the legal interest on the said \$6000 so long as they retain the same. *Darne & Gassaway v Callett et ux.* 475
- 43 — The defendants are authorised, in order to free themselves from the annual payment of the interest above directed, to pay into the court of chancery the principal money; the same when brought in, to be invested and applied, under the direction of that court, pursuant to the will of C G. *Ib.*
44. Trustees are peculiarly under the control of the court of chancery, and when a discretion is reposed in them, that tribunal will take care it shall not be abused. *Ib.*
45. A party contracting under a clear and unequivocal mistake of his legal rights, where such rights are of a doubtful character, will be relieved in equity. *Lamont's heirs and devisees v Bowley's heirs,* 500
46. L, by his will, devised to A, his wife, "for and during her natural life, my tract of land called *Chatsworth*, with the dwelling-house, and all the buildings and improvements thereon, (save and except the rope-walk.") He then devised to his son "G, and his heirs, my tract of land called *Chatsworth*, but in case my said son should die before he attains of legal age, and without issue, then I bequeath the said land to my said wife, and her assigns, to be at her own will and disposal, as it originally was, (save and except five acres, to be laid off in a long square," &c. "and that said five acres, together with the rope-walk, and all the buildings and improvements thereon, I give and bequeath to my dear nephew and partner D B, his heirs and assigns.") He then devised "all the rest and residue of the said tract, called *Chatsworth*, to my said nephew D B, and his heirs," and constituted his said nephew D B his executor, &c. D B, the nephew, believed that he had no title to the five acres, unless G, the testator's son, died *within age and without issue*, and on his having issue, supposed the son to have a clear title to the five acres. Under that impression, he was privy to a sale of that part of *Chatsworth* made by G to D L for a fair and valuable consideration, and permitted D L to take possession of, and enjoy it for many years unmolested. Afterwards, being advised that the effect of the devise was to give him these five acres, independent of the contingency of G's coming of age or dying *without issue*, he instituted an action of ejectment for them, and recovered. On a bill in equity filed by D L, the purchaser, to stay proceedings on the judgment at law—*Held*, that the relief could not be granted, that D B was not to be affected by his knowledge of the sale of the property, and his long acquiescence under it, as in so doing he acted under a clear mistake of his own title. *Ib.*

47. W, in 1785, leased from M & A, for 99 years renewable for ever, a lot of ground at a fixed annual rent, and covenanted in the lease to pay the rent. He entered upon the property, and paid the rent until 1803. The lease was not legally acknowledged or recorded. In 1812, M & A brought an action of *covenant* at law against W, to recover the rent then due, and failed, because of the defective execution and acknowledgment of the lease. W, and those claiming under him, remained in undisturbed possession of the property. In 1818 M & A filed their bill in the court of chancery against W, to compel him to account for the rents from 1803, and to accept a new lease formally executed. W afterwards died, and the suit was revived against his executors—*Held*, that the complainants were entitled to recover the rents, with interest, and that neither the judgment at law, nor the act of limitations, could affect their claim. But that the executors of W were not bound to accept a new lease. *Williams's Ex'rs. v The Mayor, &c. of Annapolis*, 529.
48. One of the most ordinary grounds of the jurisdiction of the court of chancery is that of curing the defective execution of contracts, and of compelling the parties, by a decree of the court, specifically to comply with their engagements fairly and *bona fide* executed; and although a partial relief under the contract might be obtained at law, by the recovery of damages for a breach of the contract, yet the party having that remedy, is not deprived of resorting to the court of chancery, to carry the whole engagements into full and complete effect. *Ib* 533.
49. Although the court of chancery will carry contracts into execution when *bona fide* made, yet, no person will be compelled to accept a conveyance, and forced to pay a consideration, when the title is clearly not in the person contracting to sell or lease, or when well founded doubts are entertained of its validity. *Ib* 534.
50. Where the lessee leased property with a perfect knowledge of all the circumstances connected with it, and he, and those claiming under him remained in possession, undisturbed and unmolested, from 1785 to 1815, the raising of doubts in regard to the title ought not to prevent the contract from being enforced. *Ib* 535.

See Adjustment 1.

— Alimony.

— Appeal 1, 3, 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 17.

— Inadequacy of Price 1.

— Interlocutory Decree 1.

— Parties 1, 2, 3.

COVENANT.

1. In an action of covenant by A against B, on B's warranty to defend certain slaves sold by him to A, parol evidence is admissible to prove a paramount title in another person to said slaves. *Fenwick's adm'r. v Forrest*, 415.
2. Whether covenants or conditions are to be construed mutual and independent, or dependent, is always to be collected from the evident sense and meaning of the parties, and however transposed they may be, their precedence must depend on the order of time in which the intent of the transaction requires their performance. *Speake v Sheppard*, 85.
3. M was duly bound an apprentice to, J M in the city of Baltimore to learn the trade of a *weaver*. He afterwards applied to the court of Oyer and Terminer &c. for Baltimore county, with the consent of J M, to be released from his indentures, where he was released; and with his own consent, and the consent of J R, that court passed this order—"It is adjudged and ordered, that M, be and he is hereby bound to J R, until he is 21 years of age, to learn the trade of a *saddler*," &c. In an action of *covenant* by M against J R for a breach of this order—*Held*, that M was not entitled to recover. *Mass v Rogers*, 492.

See Damages 1.

CREDITORS.

See Bill of Sale 1, 2, 3.

— Court of Chancery 12.

— Insolvent Debtors 2.

— Official Creditors.

CRIMINAL CAUSES.

See Constitution 4.

— Criminal Prosecution 5.

CRIMINAL PROSECUTION.

1. In a criminal prosecution against a person for giving a pass to a slave contrary to the act of 1796, *ch*. 67, s 19, the loss of service by the master must be averred in the indictment. *Duwall v The State*, 9.
2. The giving a pass to a slave is prohibited by the act of assembly as one

of the means only by which the offence of depriving the master of the service of the slave was to be consummated. *Ib.*

3. Under the act of 1796, *ch. 67, s 19*, prohibiting the giving a pass to a slave, &c. criminal process can only be resorted to upon the same grounds or circumstances which would authorise a civil action; that is, the actual loss of service. *Ib 10*

4. The act of assembly of 1821, *ch. 244*, directing the removal of criminal causes from *Baltimore city court* to *Baltimore county court*, and from *Baltimore county court* to *Baltimore city court*, is repugnant to the constitution, and therefore void. *The State v Dashiell*, 268

5. Whether or not a transcript of the record in a criminal prosecution, transmitted to an adjoining county court for trial, under the act of 1804, *ch. 55, s 3*, is a compliance with that act, which directs that *the record of the proceedings* shall be transmitted? *Quere. Ib.*

CUMULATIVE REMEDY.

See Assumpsit 7, 8.

CUSTOM.

See Usage and Custom.

D.

DAMAGES.

1. In an action of debt to recover damages for a breach of the condition of a bond to convey land on, &c. the consideration money being paid—it was *held*, that the value of the land, at the time of the breach of contract, was the measure of damages, and not the amount agreed to be paid. But that it was otherwise in an action upon a covenant of *seizin* in a deed of conveyance, where the consideration money of the deed was the measure of damages. *Cannell v M'Clean*, 297
2. In an action for the non-delivery of specific property on a given day, the measure of damages is the price or value of the thing on the day it ought to have been delivered. *Ib.*
3. Can the court assess damages on a promissory note or a bill of exchange, without a writ of inquiry, where judgment has been rendered by default? *Quere. Jackson v The Union Bank of Maryland*, 151 (note)
See Judgment 1.

DAYS OF GRACE.

See Promissory Note 8, 9.

— Usage and Custom 2, 3.

DEBT.

1. A bond was executed by C to M, conditioned for the conveyance of a tract of land on or before the 1st of December then next, in which is a recital setting out the payment by M to C of \$2220, as the consideration for the land. No conveyance having been made, an action of debt on the bond was brought to recover damages for a breach of the condition—*held*, that the value of the land, at the time of the breach of contract, was the measure of damages, and not the amount agreed to be paid; but it is otherwise in an action upon a covenant of *seizin* in a deed of conveyance. In the last case the consideration money of the deed is the measure of damages. *Cannell v M'Clean*, 297

DEBTOR & CREDITOR.

See Creditors.

— Insolvent Debtors 2.

DECEIT.

See Agreement 13, 14.

DECISION.

See Binding Decision.

DECLARATION.

1. If a plaintiff is laid under a peremptory rule to file his declaration by a particular day, and he fails to comply, the court may order a *non pros* to be entered against him. But if the declaration is received, and a rule laid on the defendant to plead to it, it is *then* too late for the defendant to complain. *Benson v Davis's adm'r.* 272
2. In an action of *assumpsit* against a ship owner, for the loss of goods which he had engaged to transport for freight, it is not necessary to aver in the declaration, the payment of the freight, or the tender of it. *Ferguson v Cappeau's adm'r.* 394
3. — If the bill of lading contains an exception "of the dangers of the seas," such exception must be stated in the declaration. *Ib.*
4. Every proviso in a contract, which goes to discharge the liability under it entirely, must be stated in the declaration; otherwise if it only goes to diminish the liability. *Ib.*
5. It is a general rule in pleading, that the declaration must show a title in the plaintiff—a legal cause of action.

A title defectively set out, may be cured by verdict, but the *gist*, and every thing that is of the essence of the action, must be set forth; and that is of the essence of the action, without which, the court could have no sufficient ground to give judgment, though the fact alleged be found for the plaintiff, and may be moved in arrest of judgment. *Towson v The Haure de Grace Bank*, 53

6. In an action against an innkeeper, for the loss of money, or other dead property in his inn, it is necessary to be set out in the declaration, that the plaintiff was a guest at the inn at the time of the loss. *Ib.*

7. In an action founded upon a contract, if there be in the contract a proviso or condition which operates only in defeasance of it, or merely respects the liquidation of damages after a right to them has arisen by a breach of the contract, it is not necessary to be stated in the declaration, but should come from the other side; but if there be a condition precedent, or a proviso or other matter which qualifies the contract, or goes in discharge of the liability of the defendant, it must be stated. *Ferguson v Carpenter's adm'r.* 401

See Agreement 3, 4, 5, 6, 8, 9, 10.

- Bank Notes 1.
- Consequential Injury.
- Days of Grace.
- Executor & Administrator 10.
- Judgment 1.
- Promissory Note 9.
- Variance 1.

DECLARATIONS.

See Parol Evidence 6, 7.

- Witness 1.

DECREE.

See Court of Chancery 1, 2, 3, 4, 5, 6, 12, 13, 14.

- Evidence 2.
- Judgment.
- Orphans Court 1, 2, 3.

DECRETAL ORDER.

See Appeal 6.

DEED.

1. Whether an instrument of writing on which the action is brought is the deed of the defendant, signed, sealed, and delivered by him, are facts to be submitted to the jury. *Crawford v The State use of Mair*, 231

See Conveyance.

- Parol Evidence 1.

DEFAULT.

See Judgment 1, 8.

DEFECTIVE CONTRACTS.
See Court of Chancery 43, 50.

DEFECTIVE TITLE.
See Court of Chancery 48, 49, 50.

DELIVERY.

1. If a sale of property is *bona fide* made under an order of the orphans court, on credit, &c. and the purchaser complied, or offered to comply with the terms of sale, or paid the purchase money, then the property vested in the purchaser without actual delivery. *Scott v Burch's adm'r.* 76

2. — But his omission of any one of the above circumstances, cannot constitute a ground to presume that the sale was not a real one, but was collusive. *Ib.*

DEMAND.

See Bond 1.

- Promissory Note 8, 9.
- Protest 2.
- Request 1, 2.

DEMURRER.

See Days of Grace.

- Declaration.
- Promissory Note 9.

DEPENDENT COVENANT.

See Covenant 2.

DESCENT.

1. Where the real estate of a *feme covert* is sold under the act to direct descents, the mutation of her estate from real to personal is complete when the commissioners' sale is ratified by the court, and the purchaser has complied with the terms of it, by paying the money, if the sale was for cash, or by giving bonds to the representatives, if the sale was on a credit. *The State use Rogers v Krebs, et al.* 31

See Election 1, 2, 3, 4, 5, 6.

DESCRIPTION.

See Fieri Facias 3.

DEVISE.

1. A by his will devised his lands to his three sons B, C and D, in joint tenancy in fee. B died in the life-time of the testator—*Held*, that the devise did not lapse, but on the death of the testator, C and D took the whole interest by survivorship; and not being a lapsed devise, is not within the provisions of the act of 1810, *ch. 34.* *Craycroft v Craycroft*, 54

2. The word "heirs" need not be used in a will to create an estate in fee, &c. See *HEIRS* 1, and *Beall's Lessee v Holmes*, 207
 3. The word "estate" in a devise, is equivalent to words of limitation, and sufficient to pass the fee simple, &c. See *ESTATE* 1, and *Ib.* 208
 4. The rule in *Shelley's* case is equally applicable to limitations in wills as in deeds. *Lyles v Digges's Lessee*, 364
 5. The word "issue" in a will is sometimes a word of limitation, and sometimes of purchase, according to the context of the devise. *Ib.*
- See Request 1, 2, 3, 4, 5, 6, 7.
 — Estate for Life 1, 2, 3, 4.

DEVISEES.

1. In the event of the exhaustion of the personal assets of a deceased in the payment of debts, the real estate is answerable to the creditors for the deficiency; but the claimants must prove themselves creditors of the deceased ancestor. *Carnan et al. v Turner*, 65
 2. How far a judgment or decree against executors may be used in evidence against the devisees of the testator? *Quere.* *Ib.*
- See Court of Chancery 12, 13.
 — Executor & Administrator 1.

DISCRETIONARY POWER.

- See Court 2, 3.
 — Executor & Administrator 14.
 — Trust & Trustee 1.

DISTRESS.

- See Rent 1.

DIVESTMENT.

- See Executor & Administrator 3,

DOLLARS & CENTS.

- See Judgment 7.

DONEE & DONOR.

- See Bill of Sale 1, 2, 3.

DOWER.

- See Election 4.

E.

EJECTMENT.

1. If possession has gone with a deed not legally executed and acknowledged, yet if a plaintiff in ejectment produces the deed as evidence of his title, there can be no presumption that the same was legally executed and acknowledged; though if it was not produced, a legal conveyance

- might be presumed. *Beall's Lessee v Lynn*, 336
2. A mixed possession will not prevent the presumption of a deed, unless the same is held by both parties claiming title to the same land. *Ib.*
 3. Where a plaintiff in ejectment produces a patent to B for the land for which he sues, dated in 1774, and produces a deed for the same land from C to F, dated in 1785, containing a recital of a deed, also for the same land, from B, the patentee, to C, and proved a possession in C, of a part of said land, until 1785, and in F, claiming under him, and in the lessor of the plaintiff, claiming under F, and all claiming to hold such possession under a title to the whole tract, a conveyance from the patentee to C, may be presumed. *Ib.*
- See Conveyance 4.

ELECTION.

1. Under the act of 1786, *ch.* 45, to direct descents, an election by the husband in right of his wife to take her ancestor's land at the valuation of the commissioners, and his executing bonds to the other heirs for the payment of their respective proportions, vests in him an estate in fee simple in the whole land elected to be taken, and does not pass any interest whatsoever therein to his wife. *Stevens v Richardson*, 156
2. Every election, under the acts to direct descents, to take the whole estate of the ancestor at a valuation, and to pay the other heirs their just proportions of the value in money, and passing bonds therefor, settles in the person electing, without deed from the commissioners, the legal estate in fee in the lands elected to be taken; and there is no difference between an election by a child of the intestate, and an election by a husband in right of his wife, who was a child of the intestate. *Ib.*
3. — In either case the electing party takes as a purchaser, and does not derive his title by descent from the ancestor. *Ib.*
4. — Such an election by the husband in right of his wife, and his giving bonds as before stated, entitles his second wife to dower in the lands elected to be taken. *Ib.*
5. A purchaser of the interest of the eldest son, &c. of an intestate, has a right, under the act of 1786, *ch.* 45, to direct descents, and its supplements, to elect to take the intestate's

real estate at the valuation of it by the commissioners. *Jarrett's Lessee v Cooley, et al.* 258

6. A legal estate in severalty does not vest in a party electing to take the estate of the intestate, &c. under the act to direct descents, unless he pays the other heirs their proportions of the valuation, or executes bonds to pay the same. *Ib.*

See Assumpsit 4.

— Principal & Agent 1.

ELIGIBILITY.

See Sheriff 2.

ENDORSEMENT.

See Blank Endorsement.

— Promissory Note 4, 14, 15, 16.

ENDORSEE & ENDORSOR.

See Bill of Exchange 1, 2.

— Promissory Note 3, 4, 14, 15, 16.

ENROLMENT.

1. Where an instrument of writing is required by law to be recorded, the enrolment of it is evidence of all circumstances necessary to give it validity. But this evidence is not conclusive. It is only *prima facie*, and, like all *prima facie* evidence, may be rebutted. *Crawford v The State use Muir,* 231.

2. No official copy of a deed, or other instrument of writing, is, *per se* evidence, except the original is required to be recorded.

Connelly v Bowie, 141

Hurn's Lessee v Soper, 276

See Bargain & Sale 4.

— Bill of Sale 1.

— Evidence 9, 10,

EQUITY.

See Court of Chancery.

ERROR.

See Appeal.

— Court of Appeals 2.

ESCROW.

See Evidence 8.

ESTATE.

1. The word "*estate*," in a devise, is equivalent to words of limitation, and sufficient to pass the fee simple, when not restricted by other words, not appearing to be used by the testator as descriptive only, of the local situation of the land devised; and so (upon the same principle,) will any other words have the same import. *Beall's Lessee v Holmes,* 208

ESTATE FOR LIFE.

1. A, by his will having the following introductory clause, "As touching my worldly estate wherewith it has pleased God to bless me in this life, I give, devise and dispose of, in the following form and manner, viz." devised as follow: "*Imprimis.* I give and bequeath to my eldest son B all that tract of land called" &c. "*Item.* I give and bequeath to my son C, all that tract of land called," &c. "*Item.* I give and bequeath to my son D that part of a tract of land called," &c. "*Item.* I give and bequeath to my sons E and F, all that tract of land called *Lay Hill*, to be equally divided betwixt them. *Item.* I give and bequeath to my son G, part of a tract of land called," &c. "*Item.* I give and bequeath to my daughter H, part of a tract of land called," &c. He gives her also £30 sterling, and bequeaths £10 sterling a year to a minister. "*Item.* I give and bequeath to my loving wife I, three negroes, viz." &c. "and my dwelling plantation, during her natural life. *Item.* I give and bequeath all the rest of my personal estate, viz. goods, chattels, and negroes, to be equally divided amongst my children"—*Held*, that E and F took an estate for life only in the tract of land called *Lay Hill.* *Beall's Lessee v Holmes,* 205
2. A devise of land, without words of limitation, or any other words being added, from which an intention to give an estate of inheritance can be clearly collected, passes only a life estate to the devisee—such a general devise importing in law an estate for life. *Ib.* 209, 210
3. When the words of a devise have a fixed and definite meaning, and import in law an estate for life, the introductory clause, showing that he meant to dispose of all his property, cannot enlarge it to an estate in fee. *Ib.* 222, 223
4. D, by his will devised as follows: "*Item.* I give and bequeath all that my land or messuage, with the appurtenances, whereon I now dwell, called *Worburton Manor*, as also all that tract of land called *Frankland*, adjoining thereto, to my loving son W, to hold to him, during his natural life, and from and after his decease, I give all the said messuage, lands and tenements, to my dear grandson C, eldest son of the said W, and from and after the decease of my said grandson C,

then to remain to the first son of my said grandson, and the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth and fifth, and all and every other sons of my said grandson C, to be lawfully begotten, the elder of such son or sons, and the heirs of his body lawfully issuing, always to be preferred, and to take before the younger of such sons, and the heirs of his body; and for default of such issue, then I give the same to my grandson T, second son of the said W, for and during the term of his natural life, and after his decease, to remain to his issue, in tail, in such manner as I have limited the same to my grandson C, and his issue; and for default of such issue, then to remain to my grandson G, third son of the said W, for and during the term of his natural life, and after his decease, to be and remain to his issue, in tail, in the same manner as before limited for the issue of my grandson C; and for default of such issue, then to remain to my own right heirs forever"—*Held*, that T took only an estate for life in the premises devised to him. *Lyles v Dugges's Lessee*, 364

5. Where there is a limitation to an individual or individuals of the family of the first taker, as to a son, sons or children, with superadded words of limitation to his or their heirs in fee or in tail, the ancestor referred to will take an estate for life only, notwithstanding the person or persons so selected may also fill the character of heir or heirs to such ancestor; as in the case of limitation in strict settlement on first and other sons. *Id.* 371

ESTOPPEL.

See Bill of Sale 2.

— Contract 7.

EVIDENCE.

1. Parol evidence, independent of the statute of frauds and perjuries, is inadmissible to contradict, add to, or vary, the terms of a written agreement. *Wesley et al. v Thomas et ux. Adm'x of Pumphrey*, 24
2. How far a judgment or decree against executors may be used in evidence against the devisees of the testator? *Quere. Carnan et al. v Turner*, 65
3. In trover for negro slaves, a bill of sale executed by the plaintiff to a third person for some of the negroes,

may be given in evidence by the defendant. *Scott v Burch's Adm'x.* 67

4. The proceedings of the orphans court of the account and distribution of the estate of the intestate by the administrator, are competent and sufficient evidence against the administrator. *Id.*
5. If a witness swears that he was present at the birth of a child, and the opposite party proves that he was not present, such proof is substantially to defeat the credit of the witness, and his testimony may be corroborated by proof of his prior declarations. *Cooke v Curtis et al. Lessee*, 93
6. The petition, commission, and other proceedings before commissioners of bankruptcy, and their judgment thereon, are not evidence for the purpose of showing that a person had become and had been declared a bankrupt under the provisions of the act of congress. *Barney v Patterson's Lessee*, 192
7. Where an instrument of writing is required by law to be recorded, the enrolment of it is evidence of all circumstances necessary to give it validity. But this evidence is not conclusive. It is only *prima facie*, and like all *prima facie* evidence may be rebutted. *Craufurd v The State use Muir*, 231
8. A, as the administrator of F, executed in due form of law an administration bond in 1812, which was approved by the orphans court, and on which he obtained letters of administration. He afterwards, in 1816, executed a similar bond, which was placed upon the records of the orphans court, and upon which an action was brought against one of the sureties therein, who pleaded *non est factum*, and that the bond was delivered as an *escrow*, and it was proved that the obligors signed and sealed the bond—*Held*, that parol evidence was admissible to prove how the bond of 1816 came into the office of the register of wills, and why it was recorded; but that no such evidence was admissible respecting the bond of 1812. *Id.*
9. The exemplification of the enrolment of a deed of bargain and sale of a recent date, is competent evidence of title to lands, in an action of ejectment, without producing the original. A person claiming under the grantor of such deed, but claiming against the deed, is not precluded from showing that it was obtained by fraud. *Harris's Lessee v Soper*, 762

10. Copies of deeds that are not required to be enrolled, are not evidence. *Connolly v Bowie*, 141
Hurn's Lessee v Soper, 276
 11. The answer of a defendant to a bill in chancery, in a former cause, is not legal evidence in a cause against his representatives relative to the same transactions. *Drury et al. v Conner et al.* 288
 12. The answer of a defendant in chancery, professing a want of knowledge of the facts stated in the bill, cannot be considered as evidence against those facts—its only legal effect is to compel the complainant to establish them by testimony. *Ib.*
 13. Where no objection is taken to the sufficiency of evidence offered at the trial, the court will not instruct the jury as to the sufficiency of such evidence to prove a particular fact. *Fenwick's adm'r. v Forrest*, 415
 14. The protest of a promissory note is not evidence of itself in chief of the fact of a demand on the drawer. *Whittington v The Farmers Bank of, &c.* 548
- See Attachment 5.
 — Contract 7.
 — Conveyance 3, 4.
 — Copy 1.
 — Fieri Facias 4.
 — Judgment 3, 5.
 — Parol Evidence.
 — Promissory Note 3, 4, 7.

EXCHANGE.

See Contract 7.

EXECUTION.

See Fieri Facias.

EXECUTOR & ADMINISTRATOR.

1. A obtained a decree against the executors of B for a sum of money. He afterwards filed a bill against the devisees and executors of B, in order to have a sale of the real estate of B to pay the said debt, upon the principle that the personal estate was insufficient; and he wholly relied for evidence of his debt on the decree—*Held*, that it appearing by the account upon which that decree was founded, which was for rents received by B, and his executors, of the estate of A; that at the time of the death of B, he was a creditor of A, and that the sum of money decreed the executors of B, had been received by them for rent; the real estate in the possession of the devisees of B, is in no way responsible for it. *Cannon et al. v Turner*, 65
2. How far a judgment or decree against executors may be used in evidence against the devisees of the testator? *Quere. Ib.*
3. Where a surety in an administration bond obtains possession of the goods of the intestate under an order made by the orphans court, (counter security having been required and not given,) such surety acquires a right to the goods for the purpose of paying the debts of the intestate, and for distribution; and he hath both the possession and right of property; and the order operates as a divestment or extinguishment of the right derived by the administrator—Nor does the right of possession and property supervene to the administrator on the death of the surety. *Scott v Burch's Adm'r.* 67
4. The orphans court has no jurisdiction or power to decree the goods, in any event or on any terms, to be delivered over by the surety to the administrator, *qua* administrator. *Ib.*
5. If the administrator has suffered by the misconduct of the surety in diminishing any part of the property, his remedy is by a special action on the case to recover damages. *Ib.*
6. If a sale of property is *bona fide* made under an order of the orphans court, on credit, &c. and the purchaser complied, or offered to comply with the terms of sale, or paid the purchase money, then the property vested in the purchaser without actual delivery. *Ib.*
7. — But his omission of any one of the above circumstances, cannot constitute a ground to presume that the sale was not a real one, but was collusive. *Ib.*
8. An administrator cannot at either a public or private sale purchase in the goods of his intestate for his own benefit. *Ib.*
9. The proceedings of the orphans court of the account and distribution of the estate of the intestate by the administrator, are competent and sufficient evidence against the administrator. *Ib.*
10. A copy of the will of E W, of Virginia, was exhibited and proved in this state, and letters testamentary granted to one of the executors therein named, the other having renounced. Before granting the letters, suit had been brought in the name of the executor, to whom letters were afterwards granted, and who before the letters granted declared in the action, and made profert—*Held*, that the ac-

tion could not be sustained. *Ratriev Wheeler's Ex'r.* 94

11. The administratrix of a deceased is a competent and admissible witness in an action against her husband's sureties on his guardian's bond given to the representatives of the said deceased—See *GUARDIAN & GUARDIAN'S BOND 2*, and *Seegar's ex'rs. v The State use of Bolton*, 162

12. The judgment for costs against a plaintiff executor or administrator, is never *de bonis testatoris*, and the testamentary or administration bond is not liable for such costs. *Ferguson v Cappeau's Adm'r.* 394

13. An executor is a competent witness to prove transactions between himself and the guardian of the children of the deceased, in an action against such guardian by a third person. *Fenwick's adm'r. v Forrest*, 415

14. In a bequest to executors of \$6000, to be put to interest, or vested in stock, and the interest arising therefrom to pay annually to P C for and during her natural life, if in their opinion it should be necessary for her decent support; and upon her death the said \$6000, with the interest accrued thereon, if any should remain unexpended, to be equally divided between her children—*Held*, 1. That though the executors abuse their trust by not paying to P C the interest on the \$6000, (she being in a situation to need it, for her decent support,) and by not investing the \$6000, they are not liable to pay interest on that interest, unless it is proved that they had appropriated the bequest, or the proceeds thereof, to their own use, or in some way made profit therefrom, or subjected them to hazard. 2. That they were not bound or authorised to invest the accruing interest on the \$6000, which might remain in their hands unappropriated to the support of P C, but were bound to hold the same to be applied to her support, as her wants might require. 3. That they bring into the court of chancery on, &c. the amount of the interest now due, with the interest thereon from, &c. and 4. That they annually, during the life of P C, commencing on, &c. bring into the court of chancery the legal interest on the said \$6000, so long as they retain the same. *Darne & Gassaway v Callett et ux.* 475

15. — The executors, in order to free themselves from the annual payment of the interest, are authorised to pay

into the court of chancery the said \$6000. *Ib.*

See Bill of Sale 2, 3.

- Executor De Son Tort.
- Guardian & Guardian's Bond 3.
- Orphans Court 3.
- Trust & Trustee 1.

EXECUTOR DE SON TORT.

1. There may be a rightful executor, and an executor *de son tort* of the person, and at the same time. *Dorsey v Smithson*, 61

See Bill of Sale 3.

EXEMPLIFICATION.

See Copy.

— Evidence 9, 10.

EXTINGUISHMENT.

1. If a party, at the time of contracting a debt, assigns the note of a third person to the vendor or creditor, such note does not extinguish the original contract, unless it was received as payment or satisfaction of such contract. *The Patapsco Insurance Company v Smith et al.* 166

See Agreement 7.

- Assumpsit 2, 3, 4.
- Bill of Exchange 1.
- Executor & Administrator 3.
- Promissory Note 5.

F.

FEE SIMPLE.

1. Express words of limitation, or words tantamount, are necessary in a devise to pass an estate of inheritance. *Beall's Lessee v Holmes*, 207
2. The word "*heirs*" need not be used in a will to create an estate in fee, but any other words, which sufficiently show the intention of the testator, to give to the devisee the whole of his interest in the thing devised, will have the same effect. *Ib.*
3. The word "*estate*" in a devise is equivalent to words of limitation, and sufficient to pass the fee simple when not restricted, &c. and so will any other words have the same import. *Ib.* 208
4. A general devise of land, charged with a gross sum, or with debts and legacies to be paid at all events by the devisee, and not out of the rents and profits, will pass the fee. *Ib.*
5. — So also will a general devise of land, with a charge upon the devisee of the payment of a perpetual annual sum, or of an annuity for the life of the annuitant, &c. *Ib.*

6. If there be a devise of land to one generally, with remainder over upon a limited contingency, as upon his dying under the age of 21 years, the first devisee will take an estate in fee simple. *Ib.* 209

See Estate for Life 1.

— Election 1, 2, 6.

FIERI FACIAS.

1. Under the construction given to the statute of 5 Geo II, ch. 7, lands became liable to be taken and sold by *feri facias*, in the same manner as goods and chattels. *Barney v Patterson's Lessee*, 182
2. Where there is a subsisting judgment by a court of competent jurisdiction, a *feri facias* thereon clothes the sheriff with authority to sell, and if the judgment be afterwards reversed, the title of the purchaser will not thereby be defeated. *Ib.*
3. If the return to a *feri facias* does not set out the name of the purchaser, and there is no description given of the property sold, it might perhaps be set aside on motion. But it is not the return of the sheriff that gives title to the purchaser, but the previous sale. *Ib.*
4. As a sheriff's sale of land is within the statute of frauds, some memorandum in writing is necessary. It is therefore right and proper, that, in addition to a deed for the land sold, there should be a special return of the *feri facias*, particularly describing the premises, and setting out the name of the purchaser; either of which, though not operating to pass the title, would be safe and competent evidence of the sale. *Ib.*
5. Money, specific pieces of coin, which are tangible, may be taken in execution, the actual possession and ownership being in the defendant; but money in the hands of a sheriff cannot be taken by him under a *feri facias* against the person who is entitled to receive it. Though in such case, if the sheriff brings the money into court, he will be directed to pay it to the creditor, whose execution is in his hands against the property of him for whom it was levied. *Harding v Stevenson*, 264
6. A mere *chose in action* is not subject to execution. *Ib.*
7. An execution cannot be levied on the lien a judgment creditor has upon the lands of his debtor. So, though a *feri facias*, from the time it is placed in the hands of the sheriff, binds the

personal property of a debtor, yet an execution on a judgment against his creditor, cannot be levied upon the property so bound. *Ib.*

8. Where property had been consigned to A, who had acquired a lien only as consignee and pawnee, an execution sued against him, cannot be legally levied on such property. *Ib.*
 9. U B obtains a judgment against M, in 1817. In 1819, B C also obtains a judgment against M, and on the 8th of March 1820, issues a *feri facias* thereon, returnable to November term 1820, and on the day of issuing it, places it in the hands of the sheriff. On the return day the sheriff returns the *feri facias*, "*laid as per schedule annexed, for \$958 87—residue of defendant's property secreted.*" In 1820, B W also obtains a judgment against M, upon which a *ca. sa.* is issued and served on M, and he, on the 5th of August 1820, is discharged under the insolvent laws of the District of Columbia, and on that day executes a deed of trust of all his property, under the said laws, to G B M. In 1819, U B sues out a *scire facias* on his judgment, and on the 14th of November 1820, obtains a *fiat*, and immediately issues a *feri facias* thereon, which is laid on the property returned *secreted*, as above stated, being the property in dispute. Replevin for this property is then brought by G B M, the trustee of M, against the sheriff, and the property, by consent of all parties, was sold, and the proceeds of the sale were to depend on the question, which of the parties was entitled to the priority. *Held*, that B C was so entitled; that the property was bound from the time of the delivery of his execution to the sheriff, and that that lien was not destroyed by the return of the sheriff of the execution, but continued to attach to the property after its transfer to M's trustee. *Selby v Magruder*, 454
- See Insolvent Debtors 7.

FINAL ACCOUNT.

See Evidence 4.

— Executor & Administrator 9, 11.

FOREIGNERS.

See Attachment 2.

FOREIGN JUDGMENT.

See Judgment 2, 3, 4.

FOREIGN WILL.

See Executor & Administrator 10.

FRAUD.

1. Courts of law, as well as of equity, have cognizance of fraud, but courts of law relieve against it negatively, by inquiring into the circumstances, and not permitting plaintiffs to recover in actions brought on deeds or contracts fraudulently obtained, and thus virtually annulling such deeds or contracts as against the fraudulent parties. But they cannot entertain actions upon verbal contracts within the statute, on the ground of fraud in refusing to perform them.

Lamborn v Watson, 252

Lamborn v Moore, 422

2. Fraud may be inferred from facts and circumstances—from the character of the contract, or from the condition and circumstances of the parties. *Watkins v Stockett's adm'r. D. B. N. et al.* 435

See Agreement 1, 2.

—— Bargain & Sale 4.

—— Bill of Sale 1, 2, 3.

—— Consideration 1, 2.

—— Conveyance 5.

—— Court of Chancery 18.

—— Evidence 9,

—— Fraud upon the Law.

—— Parol Evidence 5, 6, 7, 12, 13, 14.

—— Purchase & Sale 1.

FRAUD UPON THE LAW.

1. Where the constitution requires a property qualification in a sheriff, and to make him eligible land is conveyed to him; this is a fraud upon the policy of the law. *Roberts v Gibson's Ex'rs. et al.* 128

See Court of Chancery 15.

FRAUDULENT CONVEYANCE.

See Court of Chancery 15.

FRAUDULENT SALE.

See Consideration 1, 2.

—— Purchase & Sale 1.

FREEDOM.

1. An infant slave, "unable to gain a sufficient maintenance and livelihood," cannot be manumitted under the act of 1796, ch 67, s 13. *Hamilton v Cragg,* 16
2. No slave can be set free who is not under the age of 45 years, and able to work and gain a sufficient maintenance and livelihood at the time the freedom is intended to commence. 16 20

FREIGHT.

See Assumpsit 9.

—— Common Carrier 1.

FUND.

See Court of Chancery 15, 17.

G.

GENERAL PRAYER.

See Court of Chancery 9, 11.

GRACE.

See Days of Grace.

GUARDIAN & GUARDIAN'S BOND.

1. The sureties in a guardian's bond are not released from their responsibility to the ward, where, on their application to the orphans court for counter security, a new bond is executed with other sureties, although the orphans court by their order endeavour to release the former sureties. *M. Math v The State use Wheeler,* 98
2. A having intermarried with B, who was the administratrix of C, the personal estate of C came to his hands and possession, and upon a settlement of their administration account, a distributive share of the balance against them was due to D, to whom A was appointed guardian. In an action on A's bond as guardian, brought against his executors, he being dead—*Held,* that B and her sureties on the estate of C, were released from all responsibility on account of it, and A and his sureties became answerable for it on his bond as guardian; and that B, and her sureties, being thus exonerated and discharged, she was a competent and admissible witness in such action. *Seegar's Ex'rs. v The State use of Betton,* 162
3. Where the same person, who acts as the administrator of a deceased party, is appointed guardian to the representatives, whatever balance is in his hands at the rendition of a final account, (and perhaps even prior to that time,) is in his hands and possession, not as administrator, to the deceased, but as guardian to the representatives. 16.

GUEST.

See Innkeeper.

H.

HABENDUM.

1. If the habendum in a deed of bargain and sale is to the grantor, it shall be rejected, and the use enure to the grantee. *Bend v The Susquehanna Bridge & Bank Company,* 128

HEIRS.

1. The word "heirs" need not be used in a will to create an estate in fee; but any other words, which sufficiently show the intention of the testator, to give to the devisee the whole of his interest in the thing devised, will have the same effect. *Beall's Lessee v Holmes*, 207
 2. The word "heirs" may by reference to a preceding distinct limitation, be qualified and restrained to mean "sons" *Lyles v Digges's Lessee*, 369
 3. Where the word "son," following a limitation to the first son of A, and the heirs of the body of such son, it is used in relation to heirs of the body of that son; and by force of the relative word *such*, is to be understood to mean "heirs." *Ib.*
- See Devises 1, 2.

HUSBAND & WIFE.

1. Where the real estate of a *feme covert* is sold under the act to direct descents, the mutation of her estate from real to personal is complete when the commissioners' sale is ratified by the court, and the purchaser has complied with the terms of it, by paying the money, if the sale was for cash, or by giving bonds to the representatives, if the sale was on a credit. *The State use Rogers v Krebs et al.* 31
2. — The bond passed to the wife by the purchaser is a *chose in action*, as is the money in the hands of the commissioners, if withheld from her; both liable to be sued for and recovered by the husband alone. *Ib.*
3. — The money thus in the hands of the commissioners may be attached by the husband's creditor to satisfy a debt due by him. *Ib.*
4. — The money, being at the disposal of the husband, is in truth and in law his, and is liable for his debts, and can never be enjoyed by the wife but upon the single contingency of her surviving her husband before an appropriation is made of it by him. *Ib.*
5. Neither a husband nor wife is a competent witness in a civil suit to which either is a party; nor in an action between third persons, directly affecting the interest of either. *Corse v Patterson*, 153
6. In an action of replevin brought by P against C, to recover two slaves held by C under a bill of sale, in the nature of a mortgage, from N, the wife of N is not a competent witness

to prove title in N, at the time of the execution of such bill of sale. *Ib.*

7. Wherever a husband can come at the estate of his wife, without the aid of the court of chancery, that court cannot interfere in her behalf. *The State use Rogers v Krebs, et al.* 37
 8. A husband may in his own name sue on a bond passed to him and wife, or to the wife alone during coverture. He may sue alone for a breach of promise made to him and his wife after coverture, or to the wife only, to pay a sum of money to her. *Ib.*
 9. Where the right to a sum of money is vested in H on her marriage, payable by W on his taking possession of a certain estate, and she marries and dies before W took such possession, her surviving husband is entitled to receive the same on W's taking possession, with interest thereon from the time of the marriage. *S. & R. W. West v Biscoe*, 460
 10. Whether or not articles of agreement immediately between husband and wife, for her separate maintenance, will be enforced? It is clear, however, that she can make no such agreement by attorney. *Wallingsford v Wallingsford*, 485
- See Alimony.

— Election 1, 2, 3, 4.

I. J.

IGNORANCE OF LAW.

See Court of Chancery 45, 46.

INADEQUACY OF PRICE.

1. Mere inadequacy of price, unaccompanied with any circumstances, indicating that the grantor did not understand his bargain, or was so oppressed that he was glad to make it, knowing its inadequacy, may be a sufficient intention of fraud. *Watkins v Stockett's adm'r. D. B. N. et al.* 442

INCOMPETENT WITNESS.

See Husband & Wife 5, 6.

INCREASE.

See Issue 2.

INCUMBRANCE.

See Conveyance 15.

— Court of Chancery 39.

INDEBITATUS ASSUMPSIT.

See Assumpsit.

INDEPENDENT COVENANT.

See Covenant 2.

INDICTMENT.

1. In a criminal prosecution against a person for giving a pass to a slave contrary to the act of 1796, *ch. 67, s 19*, the loss of service by the master must be averred in the indictment. *Duvall v The State.* 9

INDORSEMENT.

See Endorsement.

INDORSEE & INDORSOR.

See Endorsee & Endorsor.

INFANTS.

See Manumission 1.

— Negroes & Slaves 1.

INJUNCTION.

See Appeal 3.

INLAND BILL OF EXCHANGE.

See Bill of Exchange 1.

INNKEEPER.

1. Common innkeepers, without any particular contract or agreement for that purpose, are answerable for all losses in their inns, happening either by the acts or negligence of themselves or their servants, to travellers and guests received by them; and if a servant is robbed of his master's money or goods, the master may maintain an action against the innkeeper in whose house the loss was sustained. *Towson v The Havre de Grace Bank,* 47
2. Innkeepers are answerable, by reason of the profit arising either from the keeping the horses, &c. or from entertaining of the guests themselves, in the case of money or other property, from the keeping of which alone no profit can arise. *Ib.*
3. It is the profit which alone creates his liability, and it matters not out of whose funds the expenses of the guest are defrayed. *Ib.*
4. An innkeeper is only answerable for money, or other dead property lost in his inn, where the party losing it was a guest at the inn at the time of loss. *Ib.*
5. In an action against an innkeeper for the loss of dead property in his inn, it is necessary to set out in the declaration that the plaintiff was a guest at the inn at the time of the loss. *Ib.*

INQUIRY OF DAMAGES.

1. Where an order in nature of a writ of inquiry at bar, under the act of 1794, *ch. 46*, charges the jury to in-

quire of the damages, omitting *and costs*, and the inquisition of the jury is for damages, and *about ten dollars* for costs—these are mere formal defects, which might have been amended by the inferior court, and may be amended in the appellate court under the act of 1809, *ch. 153, s 2.* *Kiersted v Rogers & Garland,* 282

2. Can the court assess damages on a promissory note or bill of exchange, without a writ of inquiry, where judgment has been rendered by default? *Quere. Jackson v The Union Bank of Maryland.* 151 (note)

INQUISITION.

See Inquiry of Damages.

INSOLVENT DEBTORS.

1. The court of appeals has adopted, and considers itself bound by the decision of the supreme court of the *United States* respecting the state insolvent laws. *The State use Rogers v Krebs et al. Garn. of Horne,* 31 (note)
2. A transfer of property by a debtor to a creditor, with a view, or under the expectation of becoming an insolvent debtor, is made void by the act of 1812, *ch. 77, s 1*, only for the purpose of vesting the property in the trustee of such debtor for the benefit of his general creditors. *Harding v Stevenson,* 264
3. A provisional trustee is bound, when demanded, to deliver over to the permanent trustee the estate and effects of the insolvent. *Williams v Ellicott,* 427
4. If the provisional trustee was entitled to a reasonable compensation for his services as such, (and *quere*, if he was so entitled?) he forfeited any claim which he might have so had by refusing to deliver over the estate and effects to the permanent trustee. *Ib.*
5. — For the same reason he is liable for interest on the amount of funds in his hands. *Ib.*
6. Could the *United States*, in case of a delivery by a provisional trustee of the estate and effects of an insolvent debtor, to the permanent trustee, maintain their right of priority, so as to subject the provisional trustee to personal liability by reason of his having so delivered over the effects, without first discharging a debt due to the government from the insolvent? *Quere.* *Ib.*
7. The provision in the *fifth* section of the act of congress of the 3d of March

- 1803, *ch.* 84, for the relief of insolvent debtors of the District of *Columbia*, that "no process against the real or personal property of the debtor shall have any effect or operation, except process of execution, and attachment in the nature of executions, which shall have been put into the hands of the *marshal* antecedent to the application," cannot nullify the effect of a lien acquired by a creditor on the personal property of the debtor in this state, where such creditor had, before the application of such debtor for the benefit of that law, delivered to the *sheriff* in this state a writ of *fieri facias* against the property of such debtor. *Selby v Magruder*, 458
8. A trustee under the insolvent law takes the property of the debtor subject to all liens, and the preference given by that law to such liens, which preference follows the property as a trust fund, as long as it remains in his hands. *Ib.* 495

See *Fieri Facias* 9.

— Tender 2.

INSTALMENTS.

See Jurisdiction 1.

— Limitation of Actions 1.

INSURANCE.

1. Policies of insurance, charter parties, or instruments of like nature, may be explained by parol evidence, of the usages of the trade to which they relate, whether such usages regard the course of the voyage or not. *Allegre v The Maryland Insurance Company*, 408
2. Parol evidence of usage is admissible to prove the meaning of the words in a policy, that in case of loss the same was to be paid in ninety days after proof and adjustment thereof. *Ib.*
3. An action cannot be maintained on a policy of insurance containing the above clause, about proof and adjustment of loss, unless such proof is first exhibited to the underwriters. *Ib.*
4. — The proof to be thus exhibited in case of a partial loss, is the protest, bill of lading and invoice, or such equivalent proof as the nature of the loss admits of, that being the kind of proof usually required. *Ib.*
5. Whether in the case of a partial loss on the cargo in a valued policy, the assured is to be indemnified according to the valuation in the policy, or to the actual value of the cargo at the port of shipment? *Quere.* *Ib.*

6. — If the cargo, however, be a *mixed* one, no adjustment can be made without proof of its value at the port of purchase. *Ib.*
7. If the underwriters in a policy having the clause relating to proof of loss and adjustment, before stated, inform the assured that they will not pay his loss, without saying that it is because of the want or deficiency of the preliminary proof, they will be held to waive the necessity for the proof. *Ib.*
8. If the underwriters refuse to pay the loss of the assured, his right of action immediately accrues, although there be a clause in the policy that payment is not to be made until ninety days after proof and adjustment of the loss, and that in case of dispute the same be settled by arbitrators. *Ib.*
9. The agreement to arbitrate does not divest courts of justice of their jurisdiction. *Ib.*

See Assumpsit 4.

INTENTION.

See Bequest 8, 9.

— Will 2, 3.

INTEREST.

See Bequest 8, 9.

— Court of Chancery 39, 42, 47.

— Executor & Administrator 14.

— Insolvent Debtors 5.

INTERLOCUTORY DECREE.

1. The chancellor will, before he determines on the merits of the cause, where the bill is for an account, &c, decree that the sum due to the complainant, (if he is entitled to recover,) be ascertained by the auditor. *Williams's Ex'rs. v The Mayor, &c. of Annapolis*, 531
- See Appeal 1.

INTESTATE'S ESTATE.

See Descent.

INTRODUCTORY CLAUSE.

See Will 3, 4.

JOINT TENANTS.

See Devise 1.

— Lapse Devise.

ISSUE.

1. The word "issue" in a will is sometimes a word of limitation, and sometimes of purchase, according to the context of the devise. *Lyles v Digges's Lessee*, 364
2. It is settled that where a female slave, bequeathed to one for the life of the

legatee, has issue during his life and after the death of the testator, such issue shall belong to the legatee, on the ground, that the issue is to be considered, not as an accessory, but as a part of the use, and to go to the person, to whom the use is limited.

Hamilton v Cragg, 18

3. A, by will, bequeathed her slave Mary, to B for life, and that at B's death, Mary was to be free. During the life of B, Mary had issue—*Held*, that such issue were slaves. *Chew v Gory*, 526

JUDGMENT.

1. The county court cannot assess damages on a judgment by default, to the amount of a bill of exchange, in an action against the endorser—the declaration setting out no cause of action, but showing that the bill was not presented for payment in time, whereby the defendant was in law discharged from all liability on account of his endorsement. *Jackson v The Union Bank of Maryland*, 151 (note)
2. Foreign judgments are not conclusive, but are always examinable, where the parties claiming the benefit of them apply to the courts of this country to enforce them. But such judgments, when coming incidentally in question, have the same force and effect as domestic judgments. *Barney v Patterson's Lessee*, 182
3. A judgment of the circuit court of the *United States*, if treated as the judgment of a foreign tribunal of competent jurisdiction, stands upon the same footing, when offered in evidence, as a domestic judgment, and is not liable to be impeached for any irregularity, though such irregularity would be a sufficient ground for reversal in an appellate court. *Ib.*
4. A judgment of the circuit court of the *United States* is not to be treated as a foreign judgment. *Ib.*
5. The doctrine that judgments and decrees are only evidence in suits between parties and privies, is not applicable where such judgments are introduced, not as binding *per se*, but only as documents connected with the chain of a plaintiff's title in ejectment. *Ib.*
6. Where there is a subsisting judgment by a court of competent jurisdiction, a *fieri facias* thereon clothes the sheriff with authority to sell, and if the judgment be afterwards reversed, the title of the purchaser will not thereby be defeated. *Ib.*
7. Whether or not since the act of 1812,

ch 135, § 3, a judgment can be entered for tobacco? *Quere. Lyles v Lyles' Ex'rs.* 273

8. A judgment by default in an action of *assumpsit* on a promissory note, is an admission of the cause of action, and the defendant's liability to the amount of the note, which must be produced at the time of executing the writ of inquiry at bar, that it may be seen whether any part of it has been paid, but which need not be proved. *Kiersted v Rogers & Garland*, 289
 9. The judgment for costs against a plaintiff administrator or executor, is never *de bonis testatoris*, and the administration or testamentary bond is not liable for such costs. *Ferguson v Cappeau's Adm'rs.* 394
 10. Where a judgment for the defendant, in an action of covenant on a lease for rent in arrear, was not a bar to the recovery of such rent on a bill in the court of chancery. *Williams's Ex'rs. v The Mayor, &c. of Annapolis*, 529
- See Appeal Bond 2.
 — Evidence 2.
 — Fieri Facias 9.
 — Lien.
 — Tobacco 1.
 — Writ of Error 1.

JURISDICTION.

1. Under an act of the legislature incorporating a company, shares were to be subscribed for to be paid in five instalments; four of the instalments had become due more than three years before the suit was brought against the defendant, who was a subscriber, and who pleaded the act of limitations. The last instalment of \$20 was not barred. *Held*, that although the last instalment of \$20 was not barred by the act of limitations, yet as the county court had not jurisdiction of that sum, that court did not err in their direction to the jury, that the plaintiffs were barred of their right of action by the defendant's plea of the act of limitations. *The Baltimore & Havre de Grace Turnpike Co. v Barnes*, 57
 2. An agreement between the parties to arbitrate a dispute between them, does not divest courts of justice of their jurisdiction. *Allegre v The Maryland Insurance Company*, 408
- See Apprentice 1; 2.
 — Circuit Court of U. S.
 — Court of Chancery 2, 3, 4, 5, 6, 48.
 — Orphans Court 2.

JURY & JURORS.

See Consideration 1, 2.

— Deed 1.

JUSTICES OF THE PEACE.

See Acknowledgment of Deeds 1, 2.

— Conveyance 3, 8, 10.

— Letter of Attorney 1, 2, 3, 4.

L.

LANDLORD & TENANT.

1. As between the landlord and tenant, the title of the former to the property leased, is not to be called in question. *Williams's ex'rs. v The Mayor, &c. of Annapolis*, 533

See Rent 1.

LANDS.

See Attachment 3, 4.

— Fieri Facias 1.

LAPSE DEVISE.

See Bequest 7.

— Devise 1.

LAWS.

See Public Laws.

LEASE.

See Court of Chancery 47.

LEGACY & LEGATEE.

See Bequest 7, 8, 9.

— Issue 2.

LETTER OF ATTORNEY.

1. Under the act of 1766, *ch. 14, s 4*, one justice of the peace has no authority to take the probate of a letter of attorney for the acknowledgment of the deed of a nonresident grantor. *Beall's Lessee v Lynn*, 336
2. — Nor has he any such authority under any other act of assembly, or under the common law. *Ib.*
3. The probate of a letter of attorney under the act of 1766, *ch. 14*, must be either in the provincial court or county court, or before one justice of the provincial court, or two justices of the county court, where the land lies. *Ib.*
4. The safest course is to prove the letter of attorney before the same persons who take the acknowledgment of the conveyance; and *quere*, whether it is not the only course? *Ib.*
5. If it becomes necessary in a trial at law to use a letter of attorney to show the authority of the agent, the court must have the attesting witnesses before them, or in their unavoidable absence proof of their handwriting, as legal evidence of its due execution. *Ib.* 350

See Power of Attorney.

LETTERS TESTAMENTARY.

See Executor & Administrator 10.

LIABILITY.

See Agent 1, 2.

— Assumpsit 4.

— Bill of Exchange 1, 2.

— Guardian & Guardian's Bond 1, 2.

LIEN.

See Conveyance 15.

— Fieri Facias 7, 8, 9.

— Insolvent Debtors 7.

LIFE ESTATE.

See Estate for Life.

LIMITATION OF ACTIONS.

1. B bequeathed a legacy to J, and appointed E his executor, who paid the legacy to J, and took his bond on the 25th of April 1797, conditioned to refund the legacy, or a rateable part thereof, if a deficiency of assets, should actually happen, after request should be made; and there being a deficiency of assets, and the estate overpaid by E, he brought an action on the above bond on the 24th of February 1816, against J, who defended himself under the act of limitations. *Held*, that as the cause of action first accrued in 1814, when the deficiency of assets was ascertained, the act of limitations was no bar. *Salisbury v Black's Adm'r.* D. B. N. 293
- See Court of Chancery 47.
- Jurisdiction 1.
- Writ of Error 1.

LIMITATION OF ESTATE.

1. The rule in *Shelley's* case is equally applicable to limitations in wills as in deeds. *Lyles v Digges's Lessee*, 364
2. The word *issue* in a will is sometimes a word of limitation, and sometimes of purchase, according to the context of the devise. *Ib.*

M.

MANUMISSION.

1. An infant slave, "unable to gain a sufficient maintenance and livelihood," cannot be manumitted under the act of 1796, *ch. 67, s 13.* *Hamilton v Cragg*, 10
2. No slave can be set free who is not both under the age of 45 years, and able to work and gain a sufficient maintenance and livelihood at the

time the freedom is intended to commence,
Ib. 20

MUTUAL COVENANTS.
See Covenant 2.

MARKET OVERT.
See Purchase & Sale 1.

MASTER & SERVANT.

1. If a bank delivers to J H notes of the bank, with a request to pass them away for the benefit of the bank, or if that could not be effected, to return them, which he agreed to do, he was, *quo ad hoc*, the servant of the bank. *Towson v The Havre de Grace Bank*, 47

MASTER AND SLAVE.

1. A master cannot properly be said to be aggrieved so as to entitle him to a civil suit for the recovery of damages against a person who had given a pass to his slave, without actual loss of service. *Duwall v The State*, 10
See Criminal Prosecution 1, 2.

MASTER OF A VESSEL.
See Contract 1, 2.

MERGER.
See Promissory Note 5.

MISTAKE.

1. A party contracting under a clear and unequivocal mistake of his legal rights, where such rights are of doubtful character, will be relieved in equity. *Lammot's heirs & Devises v Bowley's heirs*, 500
See Agreement 1, 2.
— Award 5.
— Court of Chancery 34, 46.
— Habendum 1.
— Parol Evidence 14.

MIXED POSSESSION.

1. A mixed possession will not prevent the presumption of a deed, unless the same is held by both parties claiming title to the same land. *Beall's Lessee v Lynn*. 336

MONEY.
See Bank Notes 1.
— Fieri Facias 5.

MONEY CONSIDERATION.
See Conveyance 6.
— Parol Evidence 8.

MORTGAGE.

See Agreement 1, 2.
— Court of Chancery 32, 35.
— Parol Evidence 1, 2, 12.
— Tender 1, 2.
— Trover 1, 2.

N.
NAME.

See Protest 1.

NEGLIGENCE.
See Agent 1.

NEGROES & SLAVES.

1. An infant slave, *unable to gain a sufficient maintenance and livelihood*, cannot be manumitted under the act of 1796, ch. 67, s 13. *Hamilton v Cragg*, 10

2. No slave can be set free who is not both under the age of 45 years, and able to *work and gain* a sufficient maintenance and livelihood at the time the freedom is intended to commence. *Ib.* 20

3. A, by will, bequeathed her slave *Mary* to B, for life, and that at B's death, *Mary* was to be free. During the life of B, *Mary* had issue—*Held*, that such issue were slaves for life. *Chew v Gary*, 526

NON EST FACTUM.
See Administration Bond.
— Deed 1.
— Evidence 8.

NON RESIDENTS.
See Attachment 1, 2.
— Conveyance 8, 9.
— Letter of Attorney 1, 2, 3, 4.

NOTICE.
See Award 8, 9, 10.
— Promissory Note 3, 8, 10, 11, 12, 17.
— Protest 2.
— Purchase & Sale 1.

O.

OBJECTION.
See Waiver.

OFFICIAL CHARACTER.
See Acknowledgment of Deeds 1.

OFFICIAL COPY.
See Copy.

OFFICIAL CREDITORS.
See Court of Chancery 15.
— Sheriff 2, 3.

ONUS PROBANDI.

1. The *onus probandi* rests on the party who maintains the affirmative side of the issue. *Cullum v Bevans*, 472
See Replevin 4.

ORDINANCES.

See Baltimore 1, 2, 3.

— Preamble 1.

ORIGINAL.

See Conveyance 9.

— Evidence 5.

OYER & TERMINER, &c.

See Apprentice 1, 2.

ORPHANS COURT.

1. Where a surety in an administration bond obtains possession of the goods of the intestate, under an order made by the orphans court, (counter security having been required and not given,) such surety acquires a right in the goods for the purpose of paying the debts of the intestate, and for distribution; and he hath both the possession and right of property; and the order operates as a divestment or extinguishment of the right derived by the administrator—Nor does the right of possession and property supervene to the administrator on the death of the surety. *Scott v. Burch's Adm'x.* 67
 2. — The orphans court has no jurisdiction or power to decree the goods, in any event or on any terms, to be delivered over by the surety to the administrator, *qua* administrator. *Ib.*
 3. — But if the orphans court had jurisdiction to pass such a decree, still the administrator could not maintain an action of replevin for the goods, inasmuch as the order could not of itself so operate as to confer on him the right of possession and property in the goods, before it was carried into effect by some one of the means by which that court is authorised to enforce the execution of its own decrees. *Ib.*
 4. If a sale of property is *bona fide* made under an order of the orphans court, on credit, &c. and the purchaser complied, or offered to comply with the terms of sale, or paid the purchase money, then the property vested in the purchaser without actual delivery. *Ib.*
 5. The proceedings of the orphans court of the account and distribution of the estate of the intestate by the administrator, are competent and sufficient evidence against the administrator. *Ib.*
- See Guardian & Guardian's Bond 1.

P.

PAROL AGREEMENT.

See Agreement.

— Court of Chancery 21, 22.

PAROL EVIDENCE.

1. Parol evidence, independent of the statute of frauds and perjuries, is inadmissible to contradict, add to, or vary, the terms of a written agreement. *Wesley et al. v Thomas et ux. Adm'x. of Pumphrey,* 24
2. Parol evidence is not admissible to prove that an assignment of stock was intended as a mortgage, when upon its face it purported to be an absolute assignment. *Bend v The Susquehanna Bridge & Bank Company,* 128
3. A, as the administrator of F, executed in due form of law an administration bond in 1812, which was approved by the orphans court, and on which he obtained letters of administration. He afterwards, in 1816, executed a similar bond, which was placed upon the records of the orphans court, and upon which an action was brought against one of the sureties therein, who pleaded *non est factum*, and that the bond was delivered as an *escrow*, and it was proved that the obligors signed and sealed the bond—*Held*, that parol evidence was admissible to prove how the bond of 1816 came into the office of the register of wills, and why it was recorded; but that no such evidence was admissible respecting the bond of 1812. *Craufurd v The State use Muir,* 231
4. A bill of parcels being considered evidence of a contract, and a sufficient memorandum in writing to take the case out of the statute of frauds, parol evidence cannot be received substantially to change it. *Batturs v Sellers & Patterson,* 249
5. Whether or not parol evidence can be received to establish fraud, and thereby, under particular circumstances, avoid a contract made in writing? *Quere.* *Ib.*
6. Parol evidence of declarations by a grantor, made after the date of the deed, of her intention to dispose of the same land by will, and that she had made a will, written by the grantee, which she afterwards destroyed, offered for the purpose of showing that she was ignorant of the contents of the deed, and that it was obtained by fraud and imposition, is inadmissible. *Hurn's Lessee v Soper,* 276

7. — As no foundation could be laid by such declarations for letting in parol evidence offered to prove the contents of the supposed will, it is necessarily inadmissible. *Ib.*
 8. Parol evidence is inadmissible to prove that a deed was not given for a money consideration, and therefore inoperative as a deed of bargain and sale, where the deed sets out a money consideration. *Ib.*
 9. Policies of insurance, charter parties, or instruments of like nature, may be explained by parol evidence, of the usages of the trade to which they relate, whether such usages regard the course of the voyage or not. *Allogre v The Maryland Insurance Company,* 408
 10. Parol evidence of usage is admissible to prove the meaning of the words in a policy, that in case of loss, the same was to be paid in ninety days after proof and adjustment thereof. *Ib.*
 11. In an action of covenant by A against B, on B's warranty to defend certain slaves sold by him to A, parol evidence is admissible to prove a paramount title in another person to such slaves. *Fenwick's Adm'r. v Forrest,* 415
 12. Parol evidence is inadmissible to vary or contradict the clear import of a written instrument, as well in equity as at law, except where fraud is charged, or in cases of trusts. *Watkins v Stockett's Adm'r. D. B. N. et al.* 435
 13. Unless fraud in obtaining a contract is charged in the complainant's bill, parol evidence of it cannot be received. *Ib.*
 14. Is it competent for a complainant, who seeks a specific execution of a contract, to offer parol evidence of fraud or mistake, for the purpose of proving that the parties intended to give a different sense to the instrument from that which it imports? *Quere. Wesley et al. v Thomas et ux.* 28
- See Agreement 1, 2.
— Contract 7.

PARTIES.

1. All persons are to be made parties in chancery, who are either legally or beneficially interested in the subject matter and result of the suit. *Cromwell et al. v Owings,* 10
Darne & Gassaway v Cullett, et ux. 483
2. Where under certain circumstances it was not necessary to make one of the legatees a party in a suit in chan-

- cery by the other. *Cromwell et al. v Owings,* 10
3. If a defendant in chancery agrees that a bill should be filed against him by certain complainants, he will not be allowed afterwards to object for the want of other parties. *Ib.*
- See Court of Chancery 3, 4, 5, 18, 42.

PARTIES & PRIVIES.

- See Assumpsit 4.
— Court of Chancery 2, 3, 4, 5, 6, 42.
— Judgment 5.

PARTNERS & PARTNERSHIP.

- See Assumpsit 4.

PASS TO A SLAVE.

- See Criminal Prosecution 1, 2.

PAVING.

- See Baltimore 1, 2, 3.

PAYMENT.

- See Bank Notes 2.
— Bill of Exchange 1.
— Common Carrier 1.
— Extinguishment 1.
— Rent 1.

PERSONAL LIABILITY.

- See Court of Chancery 39.

PLEADING.

1. If a plea, avowry or replication, each of which is entire, be bad in part, it is bad for the whole. *Karthus v Owings,* 134
 2. A plea of tender cannot be rejoined to, part of a replication, and a demurrer to the residue. *Ib.*
 3. The debt or duty continuing, a tender should be pleaded with a *proferet in curia*; and it should conclude, praying judgment whether the plaintiff ought to recover any damages by reason of the nonpayment of the sum alleged to have been tendered. *Ib.*
- See Appeal Bond 3.
— Declaration.
— Replevin 4.

POLICY OF INSURANCE.

- See Insurance.
— Parol Evidence 9, 10,

POOR & POOR CHILDREN.

- See Bequest 1, 2, 3, 4.

PORTION.

- See Court of Chancery 39.

POSSESSION.

- See Agreement 12.
— Conveyance 4, 9, 11, 12.

See Court of Chancery 2, 3, 4, 5, 6, 22, 50.
 — Mixed Possession.
 — Presumption.
 — Replevin 3, 5.

POWER.

See Baltimore 1, 2, 3.
 — Corporations 1.
 — Court 2, 3.
 — Discretion.

POWER OF ATTORNEY.

1. Where the execution of a power of attorney was stated to be by "J H, by my attorney S C," transferring to W B certain shares of stock, and signed and sealed by S C, and under written "Att'y. for W B"—*Held*, that it was executed so as to transfer the stock to W B. *Bend v The Susquehanna Bridge & Bank Co.* 128
 See Letter of Attorney.

PRACTICE.

1. If a plaintiff is laid under a peremptory rule to file his declaration by a particular day, and he fails to comply, the court may order the action to be *non prossed*. But if the declaration is received, and a rule laid on the defendant to plead to it, it is *then* too late for the defendant to complain. *Benson v Davis's Adm'r.* 272
2. Where a decree states that the cause was *ready for hearing*, it will be presumed by the appellate court that it was, although it does not appear to have been set down for hearing. *Rigden v Martin,* 403
3. Where no objection is taken to the sufficiency of evidence at the trial, the court will not instruct the jury as to the sufficiency of such evidence to prove a particular fact. *Fenwick's Adm'r. v Forrest,* 415
 See Appeal 17, 19.
 — Award 10.
 — Interlocutory Decree 1.

PRAYER FOR RELIEF.

See Court of Chancery 9, 10, 11.

PREAMBLE.

1. The preamble of a statute is a key to its construction, and should be resorted to, to unlock the mind of the makers, but not to restrain the general words of an enacting clause, which, understood according to their genuine and natural import, clearly and plainly express the meaning of the legislature. The same general rules of construction are equally applicable to the ordinances of a corpo-

ration. *The Mayor, &c. of Baltimore v Moore & Johnson,* 382
 See Ordinances.

PRECEDENT CONDITION.

See Agreement 12.
 — Conveyance 15, 16.
 — Court of Chancery 39.
 — Covenant 2.

PREFERENCE.

See Fieri Facias 9.

PRELIMINARY PROOF.

See Insurance 3, 4, 7, 8.

PREMIUM.

See Assumpsit 4.

PRESUMPTION.

See Conveyance 3, 4, 9, 11, 12.
 — Ejectment 1, 2, 3.
 — Mixed Possession.
 — Promissory Note 11.

PRIMA FACIE EVIDENCE.

See Enrolment 1.
 — Evidence 7.

PRINCIPAL & AGENT.

1. If the vendor of goods, knowing that the buyer who deals with him in his own name is in truth the agent of another, elect to give the credit to the agent, he cannot afterwards recover the value against the principal; but if the principal be not known at the time of the purchase, when discovered, he or the agent may be sued at the election of the seller. *The Patapsco Insurance Company v Smith, et al.* 171

See Agent 1.

— Agreement 18, 19.

PRINCIPAL & SURETY.

See Bill of Exchange 1, 2.
 — Sheriff 1.
 — Surety.

PRIORITY.

See Fieri Facias 9.
 — Insolvent Debtors 5.
 — United States.

PRIVITY OF CONTRACT.

See Assumpsit 1.

PROCEDENDO.

1. The appellate court will not reverse a judgment and direct a *procedendo*, in a case where the plaintiffs below, (the appellants,) by their own showing, never can be benefitted, where

they never can obtain the judgment of the court, but must suffer a nonsuit. *The Baltimore & Harre de Grace Turnpike Company v Barnes*, 61

PRO CONFESSO.

1. Under what circumstances a bill in chancery may be taken *pro confesso* against one of the defendants. *S. & R. W. West v Biscoe*, 460

PROFERT.

See Letters Testamentary.
— Pleading 3.

PROMISSORY NOTE.

1. If the plaintiff, at the time of taking a promissory note, knows that the article which forms its consideration is defective, and fraudulently conceals that defect from the defendant, he can sustain no suit on the note. *Sides v Hilleary*, 86
2. — Whether the plaintiff had such knowledge, and concealed it from the defendant, is a question for the jury. *Ib.*
3. In an action on a promissory note against the endorser, the plaintiff can't recover without proving that the payer made the note payable to the payee—that it was endorsed to the plaintiff—that a demand of payment was made of the payer on the day on which the note became due, and that due notice of nonpayment was given to the endorser. *Day et al. v Lyon*, 140
4. An endorsee cannot maintain an action on a promissory note payable to order, unless the endorsement is filled up at the time the note is offered in evidence. *Ib.*
5. If a debtor gives his promissory note on account of a pre-existing simple contract debt, the note does not merge or extinguish such debt; but the creditor, on nonpayment of the note, may resort to the original contract. *The Palapasco Insurance Company v Smith, et al.* 166
6. The maker of a promissory note was offered as a witness by the holder in an action against the endorser, and on his *voir dire* expressed his doubts of his interest in the event of the cause, and represented it to depend upon the question, whether the act of limitations could be pleaded to a claim he had against the endorser, in case, on a recovery against him by the plaintiff, he the witness should be sued by the endorser—*Held*, that

he was not a witness declaring himself to be interested, nor as a witness believing himself to be so. *The Bank of Columbia v Magruder's, adm'r.* 172

7. In an action against the endorser of a promissory note, the maker has not such a direct interest in the event of the suit, as ought to exclude him from giving testimony on behalf of the plaintiff—a judgment having been had against him on the note. *Ib.*
8. Where a demand of payment of the maker of a promissory note, and notice to the endorser, were on the day after the three days of grace, in conformity to the established practice and custom of the bank, (the holders of the note)—a custom known to, and understood by the endorser—*Held*, in an action against him on the note, that the demand was sufficient. *Ib.*
9. However defective a declaration may be in stating the demand of payment of a promissory note on the fourth day after it became due, or in omitting to state the custom so to make the demand, and of the endorser's knowledge of the custom, advantage, if there is any thing in the allegation, can only be taken of it on demurrer, or perhaps on the trial, by way of exception to the admissibility of the evidence. *Ib.*
10. When the party to be affected by notice of the nonpayment of a promissory note resides in a different place from the holder, the rule is, that the notice may be sent through the post office to the post office nearest to the party entitled to such notice. *Ib.*
11. — Where the notary public, who sends the notice, has inquired as to the residence of the endorser, and the post office at which he receives his letters, and sends the notice to such post office, the court will presume that to be the nearest office to the endorser, in the absence of proof to the contrary. *Ib.*
12. Notice to the endorsers of a promissory note, of the nonpayment of the note, is not necessary where they had endorsed the note after the day of payment had elapsed, and where an action had been brought on it in their names, for the use of the holder, against the drawer, and such action was by order of their attorney entered discontinued, and the note taken out. *McIlhenry, et al. v Jones*, 256
13. A judgment by default in *assumpsit*

on a promissory note, is an admission of the cause of action, and the defendant's liability to the amount of the note, which must be produced, though it need not be proved.

Kiersled v Rogers & Garland, 282

14. An endorsement in blank of a promissory note does not transfer the interest in the note, without some further act done by the holder. The act of filling it up may be done by him at any time before or at the time of the trial. *Ib.*

15. If the holder of a promissory note fills up the blank endorsement, and makes it payable to himself, he must sue as endorsee, but if it is not filled up he may sue in the name of the endorser. *Ib.*

16. An endorsee cannot maintain an action on a promissory note payable to order, where the endorsement is in blank; *The Cumberland Bank of Allegany v McKinley*, 527

17. In an action on a promissory note by the holders against the payee, the evidence by the notary public was, that on the day the note became due he presented the note at the *Cumberland* bank, the place where it was made payable, and inquired for the drawer, who was not there, and the note not being paid, was protested; that it was his practice to give notice of nonpayment to endorsors, living out of *Cumberland*, by letters addressed to them by the mail, after the protest, to the post office nearest the residence of the parties; that he believed he never omitted to give regular notice in any case; and he believed he gave such notice in this case, the defendant living at the time out of *Cumberland*; but he had no recollection of the transaction separate and distinct from the protest, and from his habits of doing business, and that his belief was founded merely on his habitual mode of doing business as notary, and his sense of duty to give notice. That he believed he obtained from *M. Wallace*, agent of the defendant, information of the place of residence of the defendant, but, that he had no particular recollection of the fact; and that he had not then, or since, any personal knowledge of the place of residence of the defendant. On this evidence the county court of *Allegany* directed the jury that the plaintiffs were not entitled to recover. *Ib.*

See Bill of Exchange.

— Extinguishment.

See Inquiry of Damages 2.

— Judgment 1.

— Protest 1, 2.

— Usage & Custom 1, 2, 3.

PROOF.

See Replevin 2, 4.

— Request 1.

PROTEST.

1. It is no objection to a protest of a promissory note, stated to have been made at the request of *The Farmers Bank of Somerset and Worcester*, instead of *The President, &c.* the corporate name. *Whittington v The Farmers Bank of, &c.* 548

2. The protest of a promissory note is not evidence of itself in chief of the fact of a demand on the drawer. *Ib.*

See Usage & Custom 2, 3.

PROPERTY QUALIFICATION.

See Fraud upon the Law.

— Sheriff 2, 3.

PROVISIONAL & PERMANENT TRUSTEES.

See Insolvent Debtors 3, 4, 5, 6.

PUBLIC LAWS.

See Bank 1.

PUBLIC POLICY.

See Court of Chancery 15.

PURCHASE.

1. The word *issue* in a will is sometimes a word of limitation, and sometimes of purchase, according to the context of the devise. *Lyles v Digges's Lessee*, 364

See Election 3.

PURCHASE & PURCHASER.

See Delivery 1, 2.

— Fieri Facias 2, 3, 4.

— Judgment 5.

— Orphans Court 4.

PURCHASE & SALE.

1. W exchanged a horse, which he had stolen, with B, for his horse, and afterwards sold B's horse to C, for a valuable consideration, and without notice on the part of C of the manner in which W had obtained him. In an action of replevin by B against C, for this last horse—*Held*, that B was not not entitled to recover. *Brown v Campsall*, 491

See Agreement 12.

— Delivery 1, 2.

Q.

QUALIFICATION.

See Property Qualification.

QUESTION OF FACT.

See Common Carrier 2.

— Conveyance 2.

R.

REAL ESTATE.

See Court of Chancery 12.

RECITAL.

See Conveyance 12.

RECORD.

See Covenant 3.

— Criminal Prosecution 5.

RELEASE.

See Apprentice 1, 2.

— Bill of Exchange 1.

— Guardian & Guardian's Bond 1.

RELIEF.

See Court of Chancery 9, 10, 11, 21, 22.

REMEDY.

See Assumpsit 7, 8.

REMOVAL OF CRIMINAL CAUSES.

See Constitution 4.

— Criminal Prosecution 5.

RENT.

1. D, on the 1st of January 1819, rented a parcel of land to M for one year, and so from year to year, at an annual rent of \$160, to be paid half yearly. R. occupied the premises in the years 1819, 1820 and 1821, and he so occupied the premises in 1821, under a contract with D, for the same rent, and on the same terms. In September 1820, D claiming \$240 for rent in arrear on the 1st of July 1820, distrained the property of R. On the 18th of May 1821, R paid \$88 to D, and he also paid him \$50 on the 18th of August 1821; he made no application of the first payment, but applied the last payment to his own debt, and said he owed a part of the rents — *Held*, that the property of R, found on the premises at the time of the distress, was liable for the rent of 1819; and that the payment made on the 18th of May 1821, must be applied to the rent becoming due after the distress in September 1820. *Ratcliff v Daniel*, 489

See Court of Chancery 47

REPLEVIN.

1. Replevin in this state is a much more extensive remedy than it is in *England*. *Cullum v Devans*, 469

2. — In *England* the tortious taking from the plaintiff is the gist of the action, and if put in issue, must be proved by the plaintiff, *Ib.*

3. — In this state it is the proper remedy in all cases where a plaintiff has a right to the possession of personal property. *Ib.*

4. In replevin in this state, the plea of property in the defendant, throws the whole burthen of proof on the plaintiff. *Ib.*

5. W exchanged a horse, which he had before stolen, with B, for a horse of B's, and afterwards sold B's horse to C, for a valuable consideration, and without notice on the part of C of the manner in which W had obtained him. In an action of replevin by B against C for this last horse. — *Held*, that B was not entitled to recover. *Brown v Campsall*, 491

See Appeal Bond 2, 3.

— Orphans Court 3.

REPLICATION.

See Appeal Bond 3.

— Pleading 1, 2, 3.

REQUEST.

1. In an action on a bond, conditioned to refund a legacy if a deficiency of assets should happen, after request should be made, it is unnecessary to prove a special request to refund. *Salisbury v Black's Adm'r. D. B. N.* 293

2. No special request is necessary where the debt becomes due on a contingency which is to happen after the execution of the contract. *Ib.*

RESCINDING OF CONTRACT.

See Agreement 6, 11.

RESIDENCE.

See Attachment 1, 2.

RETURN OF PROCESS.

See Attachment 6.

— Fieri Facias 3.

REVERSAL.

See Court of Appeals 2.

— Fieri Facias 2.

— Judgment 6.

— Procedendo 1.

REVOCATION.

See Will 1.

RIGHTS.

See Mistake 1.

RULES OF COURT.

See Appeal 4.

— Declaration 1.

— Practice 1.

S.

SALE.

See Delivery 1, 2.

— Purchase & Sale.

SECURITY.

See Surety.

SERVANT.

See Master & Servant 1.

SET OFF.

See Attachment 14.

SETTLEMENT.

1. Family settlements are to be construed most favourably to promote and effectuate the intentions of the party settling. *S. & R. W. West v Biscoe*, 460

See Adjustment.

— Court of Chancery 39.

SHERIFF.

1. The sheriff's bond is an annual bond, and the sureties of each year are responsible for the neglects, defaults, acts and receipts, of their principal, during the time only between giving the bond passed by them, and the execution of the next year's bond. *Hewitt & Russell v The State use Brown*, 95
 2. The property qualification required by the 42d article of the constitution of this state, was not intended as a fund to secure the sheriff's official creditors in addition to the bond required of him as sheriff. *Roberts v Gibson's Ex'r. et al.*, 116
 3. In order to make B eligible as sheriff, in case he should be elected, A conveyed to him certain lands, with an agreement to be reconveyed, &c. These lands were reconveyed—And as to this transaction being a fraud upon the law, &c. see COURT OF CHANCERY 15, and *Roberts v Gibson's Ex'r. et al.*, 116
 4. A sheriff's sale of land under a writ of *fieri facias* is within the statute of frauds, &c. *Barney v Patterson's Lessee*, 182
- See Agreement 13, 14.
— Attachment 6, 7.

See *Fieri Facias* 2, 4, 5, 6, 7, 8, 9.

— Judgment 6.

— Return of Process.

SHIP OWNER.

See Contract 1, 2.

SIMPLE CONTRACT DEBT.

See Assumpsit 4.

— Extinguishment.

— Promissory Note 5.

SLANDER.

See Words.

SLAVES.

See Manumission 1.

— Negroes' & Slaves.

SON.

See Heirs 2, 3.

SPECIAL AGREEMENT.

See Agreement.

SPECIAL AUTHORITY.

See Baltimore 1, 2, 3.

— Corporations 1.

SPECIAL DESCRIPTION.

See *Fieri Facias* 3.

SPECIFIC PERFORMANCE.

1. Specific performance of a contract decreed as to part of a square of ground, where a conveyance of the whole square was claimed. *Graham et ux. v Yates & Myers's Heirs et al.*, 229

See Court of Chancery 21, 22, 23.

SPECIAL REQUEST.

See Request.

STATUTE OF FRAUDS.

1. A sheriff's sale of land under a writ of *fieri facias* is within the statute of frauds, &c. *Barney's Patterson's Lessee*, 182
 2. A court of law cannot entertain actions upon verbal contracts within the statute of frauds, on the ground of fraud in refusing to perform them. *Lamborn v Watson*, 252
Lamborn v Moore, 422
- See Agreement 13, 14.
— Court of Chancery 15, 22.
— *Fieri Facias* 4.
— Parol Evidence 4.

STATUTES.

1. All statutes made in *pari materia* are to be taken and construed together, as if they were one system; and that

though not expressly referring to each other, and even after one has expired, or been repealed. *The Mayor, &c. of Baltimore v Howard*, 383

2. Where a law is of doubtful construction, that interpretation should be given it, so far as it can be done, which is pregnant with the least mischief. *The Mayor, &c. of Baltimore v Johnson & Moore*, 384
3. Statutes cited and observed upon.—
13 Elizabeth, *ch. 5*, (Frauds against Creditors.) 116
5 Geo. II, *ch. 7*, (Fieri Facias on Lands.) 182

See Acts of Assembly.

— Preamble.

STRAY.

See Actions 1.

STREETS.

See Baltimore.

SUBSTITUTION.

See Court of Chancery 15, 17.

SUMMARY PROCEEDING.

See Court of Chancery 2, 3, 5, 6.

SURETY.

1. A surety in an administration or testamentary bond, is a competent witness for the administrator or executor, *Ferguson v Cappeau's Adm'r*, 394
- See Bill of Exchange 1, 2.
— Court of Chancery 17.
— Executor & Administrator 3, 4, 5.
— Guardian & Guardian's Bond 1, 2.
— Orphans Court 1, 2.
— Sheriff 1, 2, 3.

SURPRISE.

See Agreement 1, 2.

SURVIVORSHIP.

See Devise 1.

T.

TAX.

See Assumpsit 7, 8.

— Baltimore 1, 2, 3.

TENANT.

See Landlord & Tenant.

TENDER.

1. Trover for goods mortgaged to secure a usurious debt cannot be sustained, unless the plaintiff has tendered the amount actually loaned. *Lucas, Trustee of Jamison, v Latour*, 100

2. — If the party by whom such debt is contracted becomes an insolvent debtor, his trustee is equally bound to make such tender to entitle him to recover the goods mortgaged. *Id.*

See Bank Notes 2.

— Common Carrier 1.

— Pleading 2, 3.

TESTAMENTARY BOND.

See Administration Bond.

TOBACCO.

1. If a contract is made for the payment of tobacco, which is not complied with, the plaintiff, in an action of *assumpsit* on that contract, may recover the value of the tobacco in money, *Lyles v Lyles's Ex'rs*, 273
2. Whether or not since the act of 1812, *ch. 135, s 3*, a judgment can be entered for tobacco? *Quere.* *Id.*

TRANSCRIPT.

See Criminal Prosecution, 5.

TRESPASSING STRAY.

See Actions 1.

TROVER.

1. Trover for goods mortgaged to secure a usurious debt cannot be sustained, unless the plaintiff has tendered the amount actually loaned. *Lucas, Trustee of Jamison, v Latour*, 100
2. — If the party by whom such debt is contracted becomes an insolvent debtor, his trustee, under the insolvent laws, is equally bound to make such tender to entitle him to recover the goods mortgaged. *Id.*

TRUST & TRUSTEE.

1. Trustees are peculiarly under the control of the court of chancery, and when a discretion is reposed in them, that tribunal will take care it shall not be abused. *Darne & Gassaway v Catlett, et ux.* 479

See Bargain & Sale 2.

— Bequest 1, 3.

— Court of Chancery 39, 42.

— Insolvent Debtors.

— Parol Evidence 12.

U.

UMPIRE.

See Award 11, 12.

UNCERTAIN & UNCERTAINTY.

See Bequest 1, 2, 3, 4.

UNDER TENANT.

See Rapt.

UNITED STATES.

See Attachment 1, 5.

—— Citizen.

—— Insolvent Debtors 6.

USAGE & CUSTOM.

1. A custom brought home to a party dealing with a bank, enters into the essence of the contract, becomes a constituent part of it, and must have its due weight in the exposition of it. *The Bank of Columbia v Magruder's Adm'r.* 180

2. The allowance of three days of grace, in the payment of negotiable paper, from long and universal usage, has become the general law of such contracts, but it is not such an inflexible rule as admits of no innovations upon it. *Ib.*

3. — It may be altered and controled by the agreement of the parties, and what is tantamount, it may be changed by the usage and custom of dealing perfectly known to the parties, and to which they will be supposed to have had special reference in making their contract. *Ib.*

See Agent 1.

—— Days of Grace.

—— Innkeeper.

—— Parol Evidence 9, 10.

—— Promissory Note 8, 9.

USE.

See Bargain & Sale.

—— Habendum 1.

USURY.

See Tender 1, 2.

—— Trover 1, 2.

V.

VARIANCE.

1. A variance between the words charged in a declaration in an action of slander, and the words proved, is fatal. *Stanfield v Boyer,* 248

See Agreement 9.

VERBAL AGREEMENT & CONTRACT.

See Agreement.

—— Parol Agreement.

VESTED INTEREST.

See Bequest 7, 8, 9.

—— Conveyance 15, 16, 17.

—— Court of Chancery 39.

—— Delivery 1, 2.

—— Purchase & Sale 1.

VOID & VOIDABLE.

See Bequest 1, 2, 3, 4.

—— Constitution 4.

—— Insolvent Debtors 2.

W.

WAIVER.

See Agreement 7.

—— Bill of Exchange 1.

—— Competency of Witness 1.

—— Insurance 7.

—— Practice 1.

—— Witness 2.

WARRANTY.

See Covenant 1.

WIDOW.

See Dower.

WILL.

1. Whether the will in this case was revoked by a subsequent marriage and birth of a child? *Quere. Tongue v Merton,* 21

2. In the construction of a will, the intention expressed by the testator, to be collected from the whole of the instrument, by comparing and considering the different parts together, if it be consistent with the rules of law, in relation to the nature and operation of the estate devised, must prevail, giving effect, if possible, in the exposition, to all the words of the will. It is not necessary that technical terms, or any particular form of words, should be used to convey the meaning of the testator. *Beall's Lessee v Holmes* 207, 208, 224

3. Where there are words in a devise, which would be sufficient to carry a fee, if it was the intention of the testator to give one, but which intent does not clearly appear from the words themselves, then if there be an introductory clause, it may be resorted to, to explain their meaning. *Ib.* 20

4. — But when the words of the devise have a fixed and definite meaning, and import in law an estate for life, the introductory clause, showing that the testator meant to dispose of all his property, cannot enlarge it to an estate in fee. *Ib.* 222, 223

5. The rule in *Shelley's* case is equally applicable to limitations in wills as in deeds. *Lykes v Digges's Lessee,* 364

6. The word *issue* in a will is sometimes a word of limitation and sometimes of purchase, according to the context of the devise. *Ib.*

7. Whether or not letters testamentary can be granted by the orphans court on a copy of a will certified to have been proved in another state? *Quere. Ratrie v Wheeler's Ex'r.* 94
8. A, by will, bequeathed her slave Mary to B, for life, and that at B's death Mary was to be free. During the life of B, Mary had issue—*Held*, that such issue were slaves for life. *Chew v Gary,* 526
- See Bequest.
- Devise.
- Executor & Administrator 10.

WITNESS.

1. If a witness swears that he was present at the birth of a child, and the opposite party proves that he was not present, such proof is substantially to defeat the credit of the witness, and his testimony may be corroborated by proof of his prior declarations. *Cooke v Curtis, et al. Lessee.* 93
2. If a party objects to the competency of a witness offered on the adverse side, and the court sustain the objection, and the party making it, afterwards waives it, and consents that the witness be examined, the party offering the witness has no right to require of the court to decide that he is competent independent of the waiver of the objection. *Beall's Lessee v Lynn,* 336

- See Executor & Administrator 11, 13.
- Guardian & Guardian's Bond 2.
- Husband & Wife 5.
- Promissory Note 6, 7.
- Surety 1.

WORDS:

1. Words tending to charge an unmarried woman with fornication, are not actionable. *Stanfield v Boyer.* 248
2. A variance between the words charged in the declaration, and the words proved, is fatal. 46.

WRIT OF ERROR.

1. Where a confession of judgment, by way of *supersedeas*, was entered into on the 17th of November 1815, to stay execution agreeably to the act of 1814, *ch. 84*, on a judgment rendered on the 9th of May 1815, and a writ of error issued on the 2d of February 1822 to remove the proceedings on the judgment by confession—*Held*, that the writ of error be quashed, more than three years having elapsed from the judgment by confession, and the issuing the writ of error. *Andrews, et al. v W. & J. Bosley,* 99
- See Appeal 2, 4, 9.

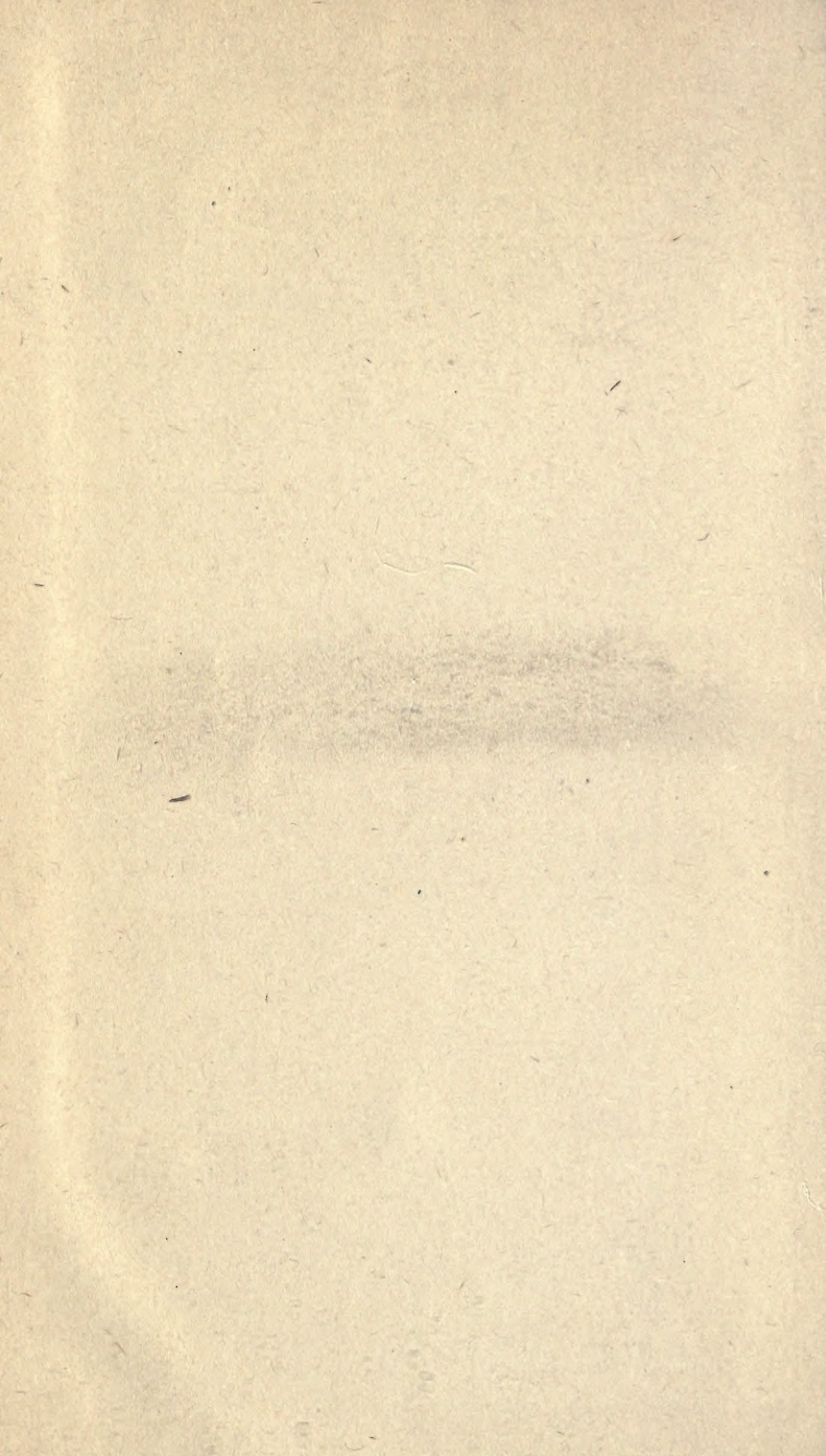
WRIT OF ERROR BOND.

See Appeal Bond.

WRIT OF INQUIRY.

See Inquiry of Damages.





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